

The Extra-Territorial Application of United States Antitrust Laws: A Proposal for An Interim Solution†

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I. INTRODUCTION

The extra-territorial¹ application of the U.S. antitrust laws² to foreign parties during a period of increasing international trade has resulted in an escalation of legal confrontations between the U.S. and foreign nations.³ The furor surrounding recent attempts to apply U.S. antitrust laws extra-territorially in *In re Uranium Antitrust Litigation (Westinghouse)*,⁴ *International Association of Machinists v. The Organization of Petroleum Exporting Countries (OPEC)*,⁵ and *Laker Airways Ltd. v. Sabena Belgian World Airlines (Laker)*⁶ and the recent reintroduction of clawback legislation

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1. We must define the manner in which we use the term "extra-territorial." Jurisdiction to prescribe, *see infra* note 10, can be based on a notion of territoriality, *i.e.*, the locus of the regulated conduct or harm. A nation as a matter of sovereignty has the right to control and regulate activities within its boundaries. This includes the right to regulate conduct occurring outside its territory that causes harmful results within its territory. The traditional example of this principle is transnational homicide, when a malefactor in State A shoots a victim across the border in State B: State B can proscribe the harmful conduct.

Alternatively, jurisdiction to prescribe can be based on nationality (the citizenship of an individual or nationality of a corporation). A state has jurisdiction to prescribe law governing the conduct of its nationals whether the conduct takes place inside or outside the territory of the state. We deal only with the application of U.S. antitrust laws when *territoriality* is the basis for asserting jurisdiction.

Many have objected to the use of the term "extra-territorial," arguing that this is a pejorative appellation used by foreign countries who object to the rather straightforward application by American courts of the "territorial" principle of jurisdiction. Other labels such as "conflicts of jurisdiction" have been proposed. *See* BUREAU OF PUBLIC AFFAIRS, U.S. DEP'T OF STATE, CURRENT POLICY BULL. NO. 481, EXTRATERRITORIALITY AND CONFLICTS OF JURISDICTION 1 (1983). While these critiques are to some extent well taken, the term "extra-territoriality" has come to be identified with the issue we address here, and we will therefore continue to use it as a matter of convenience.

2. The issues relating to the extra-territorial application of U.S. antitrust laws also inhere in other areas of "public law." This includes federal securities law, criminal law, and other areas of foreign trade law including the Trading with the Enemy Act, 50 U.S.C. app. §1 (1982), the Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78 (1982), and the Export Administration Act, 50 U.S.C. app. §§ 2401-2420 (1976 & Supp. V 1981). Nevertheless, we believe the antitrust laws are sufficiently unique to merit individual treatment.

3. International conflicts arise in three overlapping settings:

one, the application of U.S. competition law generally to competition from state-controlled or state-subsidized enterprises; two, its application to seemingly private cartel arrangements conducted in connection with the natural resources or other economic development policies or industries fundamental to our trading partners; and three, the intrusion of U.S. jurisdiction into foreign territory by the demand for the production of confidential data located abroad.

The Comm'n on the International Application of the U.S. Antitrust Laws Act: Hearings on S. 432 Before the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. 271 (1981) [hereinafter cited as *Hearings on S. 432*].

4. 480 F. Supp. 1138 (N.D. Ill. 1979), *aff'd*, 617 F.2d 1248 (7th Cir. 1980).

5. 649 F.2d 1354 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982).

6. 731 F.2d 909 (D.C. Cir. 1984).

in the Canadian⁷ and Australian⁸ parliaments are prime examples. Treble damage suits initiated by private plaintiffs asserting claims under U.S. competition law exacerbate the problem; unlike the government, individuals are not required to evaluate the impacts on foreign policy of a lawsuit.

U.S. courts have adopted limiting doctrines⁹ designed to avoid the assertion of prescriptive jurisdiction¹⁰ in the most sensitive private cases, seeking to reduce the likelihood of divisive confrontation. The executive branch of the U.S. government has responded by participating in international attempts to articulate universal norms of economic regulation. The executive branch has also negotiated several bilateral understandings with trading partners, providing for notification and consultation.¹¹ These limited responses have failed to resolve U.S. conflicts with other nations. Confrontations now occur with even greater frequency and intensity in a variety of procedural and legal contexts.¹² The underlying problem seems impervious to resolution.

The intractability of the problem is rooted in the basic nature of extra-territorial antitrust litigation. The following characteristics of U.S. antitrust litigation have a particular impact upon foreign defendants and nations:

(1) Suits are time-consuming and extraordinarily complex.

(2) U.S. antitrust procedures differ from the procedural rules followed in most foreign countries in several significant dimensions. First, private plaintiffs in U.S. antitrust actions may recover treble damages. This has been particularly offensive to foreign nations, as evidenced by retaliatory clawback and blocking legislation.¹³

7. *Canadian Government Sponsors Bill to Address Extraterritoriality Issue*, 46 ANTITRUST & TRADE REG. REP. (BNA) No. 1168, at 1106-07 (June 7, 1984).

8. The Foreign Proceedings (Excess of Jurisdiction) Act 1984, [1984] AUSTRAL. TRADE PRAC. REP. (CCH AUSTRAL. LTD.) ¶ 30-233. See generally Pengilley, *Extraterritorial Effects of United States Commercial and Antitrust Legislation: A View from "Down Under,"* 16 VAND. J. OF TRANSNAT'L L. 833, 860-61 (1983).

9. See *infra* part IV.

10. There are four aspects of jurisdictional competence. "Jurisdiction to prescribe" involves limits imposed by national and international law on a state's ability to exercise its power over specific types of activities. Closely related thereto is "discovery" jurisdiction, which involves a state's ability to obtain documents and other information. To be effective, a court or administrative agency with jurisdiction over a case must have the power to order parties to produce documents and other evidence relevant to the case. The other two aspects of jurisdiction are "adjudicatory" jurisdiction, which involves the circumstances under which particular individuals or entities may be subject to a state's power, and "enforcement" jurisdiction, which involves a state's right to enforce the orders of its courts and administrative agencies. The primary focus of this Article is on the first two aspects of jurisdiction, often viewed as a single aspect of jurisdiction.

11. See *infra* part V.

12. As demonstrated by the cases discussed *infra*, conflicts arise in the context of challenges to subject matter jurisdiction; discovery; service or venue disputes; antisuit injunctions; and attempts to enforce antitrust judgments.

13. Blocking legislation prohibits any discovery within the enacting country pertaining to foreign antitrust litigation, e.g., Foreign Proceedings (Prohibition of Certain Evidence) Act, Austral. Acts No. 121 (1976), as amended, Austral. Acts No. 202 (1976), replaced by The Foreign Proceedings (Excess of Jurisdiction) Act 1984, [1984] AUSTRAL. TRADE PRAC. REP. (CCH AUSTRAL. LTD.) ¶ 30-233. Blocking legislation may also prohibit the enforcement of a foreign antitrust judgment within the enacting state, e.g., Foreign Antitrust Judgments (Restriction of Enforcement) Act, Austral. Acts No. 13 (1979). Clawback legislation provides for recoupment of damages awarded in an antitrust action against assets of a plaintiff found within the enacting state. A partial clawback statute allows for recoupment of two-thirds of the damage award, which represents the punitive element of the trebled recovery. E.g., Protection of Trading Interests Act, 1980, ch. 11 (United Kingdom). A total clawback statute would allow recoupment of the entire damage award. Countries that have enacted blocking or clawback statutes include the United Kingdom and Canada.

Second, successful U.S. defendants are rarely entitled to costs,¹⁴ while winning plaintiffs may recover extremely high attorney's fees from defendants. Third, the U.S. is very liberal in allowing compulsory discovery of evidence.

(3) Extremely large sums are likely to be at issue.

(4) Parties raising antitrust issues may behave strategically because of commercial interests not directly related to the lawsuit. For example, an antitrust litigation strategy may be designed to strengthen the litigant's position in an exogenous negotiation.¹⁵

In addition, the following dimensions of international legal relations complicate an effective resolution of the problem:

(5) Direct conflicts are likely between the relevant public policies of the forum and the affected and chartering nations,¹⁶ particularly regarding competition law.

(6) Discovery and enforcement procedures involve sensitive relations between nation-states and are not likely to be governed by clearcut international law.

The solution to the problem inherent in extra-territorial application of national competition laws requires the promulgation and enforcement of an international competition law code by an authoritative international body. Achieving this goal in the foreseeable future is unlikely. The few attempts in this direction have, to date, been halfhearted and in the most part unsuccessful. This Article, therefore, proposes an interim solution to be taken by the U.S. We advocate a narrow interpretation of all the doctrines limiting extra-territorial applications in order to generate friction conducive to reaching a multilateral solution. Significant foreign relations interests of the U.S. would be protected in the interim by a statutorily mandated process in which the executive branch could invoke a presumption against the assertion of jurisdiction in appropriate cases. Our proposal is based upon the following sequence of analysis: Part II briefly summarizes the U.S. position on the extra-territorial application of its competition laws. Part III proposes international legal system objectives that should guide the extra-territorial application of national competition law. Part IV evaluates the sovereignty-related defenses developed by the U.S. courts, to determine whether they satisfy the objectives identified in part III, and similarly evaluates the evolving principles of the jurisdictional rule of reason. Part V then considers the political solutions proposed or undertaken to date. Finally, in part VI we propose our interim statutory solution.

14. A successful defendant can recover attorneys fees under the Export Trading Company Act, 15 U.S.C. § 4016(b)(4) (1982) and the recently enacted National Cooperative Research Act of 1984, § 5. See 47 ANTITRUST & TRADE REG. REP. (BNA) No. 1183, at 588 (Sept. 27, 1984).

15. See, e.g., *Timberlane Lumber v. Bank of Am.*, 574 F. Supp. 1453, 1463 (N.D. Cal. 1983) ("[T]his lawsuit—essentially a group of separate tort actions which were deemed unsuccessful in Honduran courts—has been repackaged as an antitrust case in an attempt to subvert prudent and traditional limits upon applications of our laws to foreign conduct and actors."). A more detailed discussion of that case is found *infra* text accompanying notes 111–22.

16. Throughout this Article, the country seeking to assert jurisdiction will be referred to as the *forum* or *regulating* nation. Nations whose policies are called into question by the assertion of the forum's jurisdiction will be referred to as the *affected* nations. In many instances, the affected or forum nation will also be the country in which the defendant corporation (or subsidiary) is chartered and where it does a majority of its business. In these instances the forum nation will also be the *chartering* nation.

II. THE U.S. POSITION ON EXTRA-TERRITORIALITY

The U.S. antitrust laws expressly provide for their application to "trade or commerce with foreign nations."¹⁷ When this clause first came before the Supreme Court in 1909 in *American Banana Co. v. United Fruit Co.*,¹⁸ it was construed as not covering conduct occurring outside the U.S. With the U.S. emerging as the dominant world power after World War II, the doctrine of strict territoriality was abandoned and the prevailing standard for the extra-territorial application of U.S. antitrust laws emerged. This test is set out in the 1945 decision, *United States v. Aluminum Co. of America (Alcoa)*.¹⁹ In *Alcoa* Judge Learned Hand wrote that the Sherman Act applied to extra-territorial activities if they were "intended to affect imports or exports, [and] . . . [are] shown actually to have had some effect on them."²⁰ The prevailing interpretation of this "effects test" is that the impact of foreign conduct on U.S. commerce must be direct, substantial, and reasonably foreseeable.²¹

Foreign governments protest that the extra-territorial application of U.S. antitrust laws under the "effects test" is contrary to international law and constitutes an

17. *E.g.*, §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1-2 (1982), refer to "trade or commerce . . . with foreign nations." Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (1982), also applies to "commerce . . . with foreign nations." *Id.* § 44. The Clayton Act (and the Robinson-Patman Act, which is technically an amendment to the Clayton Act) similarly applies to commerce with foreign nations. *See* 15 U.S.C. § 12 (1982); *see also* the Wilson Tariff Act, 15 U.S.C. § 8 (1982).

18. 213 U.S. 347, 355-56 (1909).

19. 148 F.2d 416 (2d Cir. 1945). In *Alcoa*, French, Swiss, and British aluminum producers formed a cartel operating Alliance, a Swiss corporation. Alcoa's Canadian subsidiary participated in the cartel, which allocated production and controlled the price of aluminum. Judge Hand asserted, "It is settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize." *Id.* at 443.

20. *Id.* at 444.

21. W. FUGATE, *FOREIGN COMMERCE AND THE ANTITRUST LAWS* § 2.20, at 73-74 (2d ed. 1973); Blechman, *Antitrust Jurisdiction, Discovery and Enforcement in the International Sphere: An Appraisal of American Development and Foreign Reactions*, 49 ANTITRUST L.J. 1197, 1198-99 (1980). The scope of extra-territoriality as articulated in *Alcoa* is unclear. While *Alcoa* appears to have articulated an "intended effects" standard, a number of lower courts have discarded the requirement that the effects shown must have been either intended or foreseeable. *See, e.g.*, *Fleischmann Distilling Corp. v. Distillers Co.*, 395 F. Supp. 221, 226-27 (S.D.N.Y. 1975) (intent to cause direct and material adverse effect on interstate or foreign commerce presumed as a natural consequence of actions taken); *Todhunter-Mitchell & Co. v. Anheuser-Busch, Inc.*, 383 F. Supp. 586, 587, *modifying* 375 F. Supp. 610 (E.D. Pa. 1974) (that the challenged conduct "directly affected the flow of commerce out of this country"). There has not been a consistent articulation of the threshold of "effects" required to invest U.S. courts with subject matter jurisdiction. Thus, the test has been alternatively described as "not both insubstantial and indirect," *see, e.g.*, *Dominicus Americana Bohio v. Gulf & W. Indus.*, 473 F. Supp. 680, 687 (S.D.N.Y. 1979); *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92, 102-03 (C.D. Cal. 1971), *aff'd*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972) (quoting with approval J. VON KALINOWSKI, ANTITRUST AND TRADE REGULATION §§ 5.01-5.502 (1969)); or "direct and substantial," *see, e.g.*, cases listed in Kintner & Griffin, *Jurisdiction Over Foreign Commerce Under the Sherman Antitrust Act*, 18 B.C. IND. & COMM. L. REV. 199, 206 (1977). "Direct, substantial and foreseeable" is essentially the standard urged by the Department of Justice, Antitrust Division, in its ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS 6-7 (rev. 1977) [hereinafter cited as D.O.J. GUIDE]. It is also the standard that Congress used in elaborating upon the scope of the extra-territorial application of U.S. antitrust laws to export transactions in the Foreign Trade Antitrust Improvement Act of 1982, 15 U.S.C. § 6(a) (1982) ("direct, substantial and reasonably foreseeable"). Acceptance of this standard is not universal, however. A court recently held that "it is probably unnecessary for that effect to be both substantial and direct, so long as it is not *de minimis*." *Timberlane Lumber v. Bank of Am.*, 574 F. Supp. 1453, 1464 (N.D. Cal. 1983). One recent gloss has been placed on this standard. In *Nat'l Bank of Canada v. Interbank Card Ass'n*, 666 F.2d 6 (2d Cir. 1981), the Second Circuit, relying upon the Supreme Court's decision in *Brunswick Corp. v. Pueblo Bowl-O-Mat Inc.*, 429 U.S. 477 (1977), held that the effects must be *anticompetitive* effects on United States commerce.

invasion of their sovereignty.²² They contend that an "effects test" is inappropriate because it should be applied only to conduct universally deemed to be criminal, and that no such consensus exists as to the antitrust laws of the U.S. To the contrary, those laws are seen as merely a facet of American economic policy.²³ Yet the U.S. is apparently not alone in attributing extra-territoriality to its economic regulatory laws. The trade practice laws of several European nations²⁴ and the European Economic Community²⁵ by their terms can be, and in some cases have been, applied extra-territorially.

The *Westinghouse* litigation²⁶ provides a classic example of the conflicts resulting from the extra-territorial application of U.S. antitrust laws. Westinghouse, in the midst of a contract litigation with a number of public utilities,²⁷ learned that its

22. Since 1945 at least 20 foreign governments have protested American assertions of jurisdiction in international antitrust cases. See, e.g., *FTC v. Compagnie De Saint-Gobain-Pont-A-Mousson*, 636 F.2d 1300 (D.C. Cir. 1980) (French Government protests against FTC service of investigatory subpoenas by registered mail). See generally Willoughby, *Remarks by an English Solicitor*, in *PERSPECTIVES ON THE EXTRATERRITORIAL APPLICATION OF U.S. ANTITRUST AND OTHER LAWS* 56 (J. Griffin ed. 1979).

23. See, e.g., Comment, *The Protection of Trading Interests Act of 1980: Britain's Response to U.S. Extraterritorial Antitrust Enforcement*, 2 *Nw. J. OF INT'L L. & B.* 476, 477-78 nn.10-12 (1980).

24. For example, art. 98(2) of West Germany's competition statute provides that "[t]his Law applies to all restraints of competition which have effect within the territory to which this Law applies." Act Against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*) July 27, 1957, [1957] *Bundesgesetzblatt [BGBl]* I 1080 (W. Germany), as republished April 4, 1974 [1974] *BGBl* I 869, amended, Law of June 28, 1976, [1976] *BGBl* I 917. The Australian Cartels Act expressly applies to "cartels concluded abroad but affecting the domestic market" and to "cartels relating to foreign markets." The Australian Trade Practice Act of 1974, *Austl. Acts* P. 397 (Supp. 1974), as amended Act 1975, No. 63; Act 1976, No. 88; Act 1977, No. 81; Act 1977, No. 151; Act 1978, No. 206. The Swiss Cartel law has been held to apply to "restrictions on competition effected abroad and having their effects in Switzerland." *Bundesgericht*, 21 March 1967; 93 *BGE* II 192.

25. In *Imperial Chem. Indus. Ltd. v. E.C. Comm'n*, 11 *Comm. Mkt. L.R.* 557 (1972), the Court of Justice of the European Communities held its antitrust law applicable to conduct occurring outside of the community. It reached this result by partially piercing the corporate veil, and it cautioned that "jurisdiction is not based merely on the effects of actions committed outside the Community, but on activities attributable to the claimant within the Common Market area." *Id.* at 640. Earlier, the court asserted that "the Community cannot be denied the right, on the basis of public international law, of taking the necessary steps to safeguard its measures against conduct distorting competition, which has come to light within the Common Market, even if those responsible for the said conduct reside in a non-member country." *Id.* at 638. The Commission (the enforcing body) has consistently advocated an extra-territorial reach for the Common Market antitrust law, *In re Omega Watches*, 9 *Comm. Mkt. L.R.* D49 (1970). More recently, the EEC has proceeded with its case against International Business Machines (IBM) despite repeated expressions of concern by the U.S. government. See generally *EEC Commission Will Continue with Antitrust Case Against IBM*, 42 *ANTITRUST & TRADE REG. REP.* (BNA) 1030-33 (1982); *Wall Street Journal*, April 26, 1984, at 34, col. 1. This case has been settled. See *id.*, Aug. 3, 1984, at 2, col. 3.

26. *In re Uranium Antitrust Litig.*, 480 F. Supp. 1138 (N.D. Ill. 1979), *aff'd*, 617 F.2d 1248 (7th Cir. 1980); see Comment, *supra* note 23, at 483-91. For a detailed review of the facts see Note, *The Effects Tests vs. Act of State Considerations: A Comparison of the OPEC and Westinghouse Decisions*, 53 *COLO. L. REV.* 677 (1982).

27. In the late 1960s and early 1970s the Westinghouse Electric Corporation (Westinghouse), a major supplier of nuclear power plants for public utilities, entered into a number of contracts to construct nuclear facilities. The contracts also provided that Westinghouse would supply the facilities with uranium fuel for a fixed term at a set price, subject to an escalator clause pegged to the general rate of inflation. Westinghouse's commitment to supply uranium ultimately reached in excess of 70 million pounds. Westinghouse was not a significant producer of uranium at the time it entered into these arrangements and did not cover itself with future contracts to guarantee its ability to deliver the uranium. The going price for uranium was \$6 to \$8 per pound during the time the contracts were made. By 1975 the price of uranium had risen much faster than the rate of inflation, up to \$26 per pound, and by 1978 the price reached \$44 per pound. In 1975, facing at that time a multibillion dollar loss if it continued to supply the promised uranium at contract price, Westinghouse notified the utilities that it would not honor the contracts because of commercial impracticability. See U.C.C. § 2-615 (1978). In response to the repudiation the electric utilities sued Westinghouse, alleging breach of contract. The federal cases were consolidated into one action in the Eastern District of Virginia. *In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 405 F. Supp. 316 (J.P.M.D.L. 1974). The sums in controversy were staggering. The potential consequences of the litigation were equally sobering. A court order to perform could have rendered Westinghouse insolvent; if Westinghouse were excused from performance the utilities would have to suffer an unexpected and significant increase in costs.

inability to perform its contractual obligations was caused by the operation of a cartel formed by the major uranium producers. Westinghouse filed suit in United States district court, alleging a violation of the U.S. antitrust laws by twenty-nine defendants, including foreign producers from Australia, England, South Africa, and Canada.²⁸

Westinghouse embarked upon a discovery effort, obtaining letters rogatory²⁹ from the American courts. The U.S. Department of Justice also initiated its own grand jury proceeding. Australia, South Africa, and Canada adopted measures prohibiting compliance with the discovery requests.³⁰ In England, Westinghouse sought enforcement from the House of Lords. The House of Lords refused to enforce the letters rogatory, deferring to the British government's view that British sovereignty would otherwise be infringed.³¹

The foreign defendants also refused to appear in the private antitrust action and default judgments were entered against them.³² The four affected nations filed amicus briefs arguing lack of subject matter jurisdiction.³³ The countries also requested the support of the U.S. Attorney General. The Attorney General did not submit an amicus curiae brief supporting the position of the four affected nations.³⁴ The

28. *In re Uranium Antitrust Litig.*, 480 F. Supp. 1138 (N.D. Ill. 1979), *aff'd*, 617 F.2d 1248 (7th Cir. 1980). The foreign defendants included Conzinc Rio Tinto of Australia Ltd., Mary Kathleen Uranium Ltd., Pancontinental Mining Ltd., and Queensland Mines Ltd. (Australian); Rio Tinto Zinc Corp. Ltd., and RTZ Services Ltd. (British); Nuclear Fuels Corp. of South Africa Ltd., and Anglo American Corp. of South Africa Ltd. (South African); and Rio Algom Ltd. (Canadian). The cartel was allegedly formed in response to the passage of U.S. legislation barring the importation of uranium. See Note, *supra* note 26, at 678. This legislation closed off three-quarters of the world market to foreign producers. To avoid ruin, the foreign producers allegedly met to divide up the rest of the market. Westinghouse sought \$6 billion in damages for the losses incurred as a result of the activities of the cartel.

29. A "letter rogatory" is "[a] request by one court of another court in an independent jurisdiction, that a witness be examined upon interrogatories sent with the request." BLACK'S LAW DICTIONARY 815 (5th ed. 1979). Wright & Miller define the term as follows:

Letters rogatory are formal communications in writing sent by a court in which an action is pending to a court or judge of a foreign country requesting that the testimony of a witness resident within the jurisdiction of the latter court may be there formally taken under its direction and transmitted to the first court for use in the pending action.

8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2083 (1970).

30. See *In re Westinghouse Elec. Corp. v. Duquesne Light Co.*, 78 D.L.R.3d 3 (Ont. 1977); The Foreign Proceedings (Prohibition of Certain Evidence) Act, *supra* note 13.

31. The English courts initially gave effect to the letters rogatory pursuant to the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters of 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, 847 U.N.T.S. 231, to which both England and the U.S. are signatories. The Convention was executed in the United Kingdom by the Evidence (Proceeding in Other Jurisdictions) Act, 1975, ch. 34. The foreign parties and corporations named in the letters refused to testify, claiming privilege under the fifth amendment to the U.S. Constitution and comparable EEC and British safeguards. The Department of Justice, seeking the same information for the grand jury, assured the presiding U.S. district judge that since the evidence requested by the letters rogatory might be indispensable to the grand jury investigation, the witnesses' testimony would be immunized for use in any criminal prosecution in the U.S. Westinghouse then sought an order to compel discovery in England, and the issue came before the House of Lords. *Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp.*, [1978] 2 W.L.R. 81 (H.L. 1977). The House of Lords held that it was not obligated to comply under the Hague Convention because Department of Justice intervention had converted the case into a criminal proceeding.

32. *In re Uranium Antitrust Litig.*, 480 F. Supp. 1138 (N.D. Ill. 1979), *aff'd*, 617 F.2d 1248 (7th Cir. 1980).

33. *In re Uranium Antitrust Litig.*, 617 F.2d 1248, 1253 (7th Cir. 1980).

34. Instead, Associate Attorney General Shenefield wrote a short letter to District Court Judge Marshall, stating in part that "[t]he views and representations advanced by these foreign governments are entitled to appropriate deference and weight in resolving legal questions that turn, at least in part, on considerations of international comity." Letter from John Shenefield to Judge Prentice H. Marshall (May 6, 1980).

amicus briefs filed by the affected nations had a negative effect on the appellate court.³⁵

The case ultimately was settled by the parties,³⁶ and the Department of Justice terminated its investigation without taking any action. Unfortunately, the litigation had lasting repercussions; the most serious has been the enactment by all four affected nations of blocking and other protective legislation.³⁷

III. INTERNATIONAL LEGAL SYSTEM OBJECTIVES THAT SHOULD GUIDE EXTRA-TERRITORIAL APPLICATION OF NATIONAL COMPETITION LAW

The formulation of proper boundaries for the extra-territorial application of U.S. antitrust law must begin with a consideration on a world level of the implications of extra-territoriality. Purely national approaches to these issues will exacerbate tensions between nations and produce a poor environment for international trade. An ideal resolution of the problem must effectively: (1) insure against gaps in the international order so that firms cannot position themselves in "havens" and avoid the application of reasonable national competition law; (2) provide an equitable and efficient climate for the transaction of international business; (3) consider and balance the political and economic interests of both forum and affected nations; and (4) balance or integrate the differences in procedural and substantive law among the forum and affected nations.

A. *Avoidance of Havens*

Stringent limits on extra-territorial application of competition laws are likely to produce gaps in which no nation's laws are applicable. For example, assume that marketing agreements violating the competition laws of many nations are made by a number of multinational firms on a ship of a developing country with no competition law. A very limited definition of extra-territorial application would place the agreement beyond the reach of any single sovereign state. Multinationals could seek refuge by positioning anticompetitive transactions in nations whose trade regulation laws do not condemn the anticompetitive conduct. Substantial components of international trade could fall outside the regulatory authority of responsible governments. Such a phenomenon could produce significant inefficiencies in world trade and could have negative impacts in many world economies.³⁸

35. The court wrote:

In the present case, the defaulters have contumaciously refused to come into court and present evidence as to why the District Court should not exercise its jurisdiction. They have chosen instead to present their entire case through surrogates. . . . And shockingly to us, the governments of the defaulters have subserviently presented for them their case against the exercise of jurisdiction.

In re Uranium Antitrust Litig., 617 F.2d 1248, 1255-56 (7th Cir. 1980).

36. See Note, *supra* note 26, at 677 n.6.

37. See *supra* note 7 (Canada); *supra* notes 8, 13 (Australia); The Atomic Energy Act of 1978, 15 Stat. Repub. S. Afr. 1061 (1978) (South Africa); Protection of Trading Interests Act, 1980, ch. 11 (United Kingdom).

38. Cartel behavior resulting in boycotts and price-fixing may cause deadweight loss in domestic economies and may also distort trade exchanges. The Arab boycott of Jewish-owned firms (and/or firms doing business with the State of Israel) and the uranium cartel at issue in *Westinghouse* provide ready examples.

Conversely, if each nation asserts far-reaching extra-territorial application of its competition laws, the result may be a tumultuous environment for world trade. Firms will expend much time and effort trying to comply with conflicting rules. The conflicting rules in turn represent an uncoordinated and inefficient regulatory scheme. Ideally, each nation's extra-territorial reach should physically complement that of other nations. Unfortunately, such a visionary arrangement is not politically feasible in today's world.³⁹ Also, pragmatic roadblocks prevent nations from acting independently of an effective international authority to produce a synergistic scheme of regulation.⁴⁰

Consider the lessons from the *Westinghouse* litigation.⁴¹ The majority of defendants were chartered within the U.S. Some of the American firms had foreign subsidiaries that participated in the cartel.⁴² It was alleged that meetings of the cartel were held throughout the world, including the U.S. (Illinois). One of the twenty-nine defendants was Conzinc Rio Tinto of Australia Ltd. (C.R.A.), identified by the Seventh Circuit Court of Appeals as an Australian corporation.⁴³ Yet C.R.A. had American cousins. R.T.Z. (British) was majority owner of C.R.A.; R.T.Z. also owned Rio Algom Limited (Canadian), which owned Atlas Alloys, Inc. (American), which owned Rio Algom Corporation (American). All but Atlas Alloys were defendants in the litigation and Rio Algom entered an appearance in the suit.⁴⁴ Many nations had an interest in the transaction. It appears impossible to compartmentalize the cartel arrangement as it existed among the interested nations in the consortium, for the relationships involved were truly international.

The extra-territorial application of a single nation's laws to such international cartel arrangements yields only a second-best result. Yet for the present time, extra-territorialism is preferable to the exemption from national competition laws of international transactions with deleterious economic effects identical to those of domestic transactions subject to the law.

B. *Positive Climate for International Trade*

The fear of extra-territorial application of conflicting national competition laws inevitably leads to inefficient business planning. Multinationals adopt compliance procedures to ensure, to the extent reasonably possible, that proposed courses of action do not violate the law of the host country. These compliance procedures will break down in the face of differing and conflicting national rules and regulations.

39. The well-documented disparate North-South, have vs. have-nots viewpoints operated to defeat attempts to work out truly international agreements on the use of seabed resources and intellectual property. *See, e.g.,* L. HENKIN, *HOW NATIONS BEHAVE* 220-22 (2d ed. 1979).

40. Nations voluntarily yielding their sovereign authority over international transactions affecting their economy may be victimized by free-riders. Bilateral or multilateral agreements cannot effectively reach activities originating outside the territories of the participants without encountering the extra-territoriality conundrum.

41. *In re Uranium Antitrust Litig.*, 617 F.2d 1248 (7th Cir. 1980).

42. *See, e.g., id.* at 1252 n.5 (Gulf Oil Corporation, U.S., and its wholly owned subsidiary Gulf Minerals Canada Ltd.).

43. *Id.* at 1253 n.11.

44. *See supra* note 28.

Even when compliance procedures can be employed, they may greatly reduce the efficiency of the complying firm. For example, a strategy of compliance may result in a series of separately negotiated, relatively small trade agreements rather than larger, more efficient multiparty agreements. Restrictions imposed by competition laws may make it impossible (or at least dangerous) for a firm to comply with the demands of a particular host nation. In such a circumstance business opportunities may be lost altogether.⁴⁵

In addition, failure to adequately comply with concurrently applicable yet contradictory national competition laws invites potentially conflicting legal orders. This problem is especially acute when the extra-territorial application of U.S. antitrust laws is anticipated. The substantive content of U.S. antitrust law is ambiguous and uncertain, and involves potential liability of gargantuan sums through trebled damages⁴⁶ and/or long term and highly intrusive injunctive relief. Business planning is negatively affected by this threat because multinationals cannot accurately predict whether new methods of doing business will result in unanticipated legal problems. Risk-averse firms that respond to such an unstable environment by taking conservative, defensive postures are likely to hamper the efficiency of their operations. The continuing presence of these inefficiencies frustrates the goal of fostering a positive climate for international trade.

C. Consideration of the Legitimate Interests of Affected Nations

An enormous variance exists in the scope of applied competition law among the great trading nations. In 1965 Zwarensteyn argued, "There is but little question that the American antitrust laws contain little if any generally accepted principles of law recognized by the international community of civilized nations."⁴⁷ Although the quote overstates the case in the 1980s,⁴⁸ it is clear that as applied U.S. antitrust law reaches far beyond the trade practice law of many other Western industrialized nations.⁴⁹ Outside the West the differences become stark. The policies underlying the antitrust laws are completely inconsistent with the market concepts of Islamic and developing third world economies.⁵⁰ Similarly, U.S. competition policy is clearly in direct conflict with the market philosophies of the Socialist countries.⁵¹

Variations in the nature of competition policies assume significance because

45. If all multinational firms were subject to the same constraints, the host nation would have to either modify its demands or lose the benefits of the business development. But multinationals are likely to be primarily influenced by the laws of their chartering country. A Japanese firm doing little business in the U.S. might be quite willing to undertake an opportunity in Australia even though it might be required to engage in activities in violation of the U.S. antitrust laws. A U.S. based multinational might feel compelled to forfeit the opportunity.

46. In *Westinghouse* the sums exceeded \$6 billion. See *supra* note 28. In *Laker* the plaintiff sought \$1 billion. See *British Airways Board v. Laker Airways Ltd.*, [1983] 3 W.L.R. 545.

47. Zwarensteyn, *The Foreign Reach of the American Antitrust Laws*, 3 AM. BUS. L.J. 163, 177 (1965).

48. See Baxter, *Standards for the Application of United States Antitrust Law in an International Environment*, 1982 B.Y.U. L. Rev. 841.

49. For example, the Court in *Laker* noted the conflict between the English and U.S. courts and commented that "its sources are the fundamentally opposed national policies toward prohibition of anticompetitive business activity." *Laker Airways Ltd. v. Sabena Belgian World Airlines*, 731 F.2d 909, 945 (D.C. Cir. 1984).

50. See *infra* text accompanying note 212.

51. See, e.g., *Outboard Marine Corp. v. Pezetel*, 461 F. Supp. 384 (D. Del. 1978).

countries may give very different weights to the relative values of competition policy versus social and political objectives. The U.S. consistently takes the position that the antitrust laws are an integral component of the American economic system. Other nations, however, give little or no weight to competition policy factors in taking or encouraging actions that may have anticompetitive impacts within the U.S. Competition policy factors were presumably given no consideration in the formation of the Arab boycott of Israel.⁵² In the *Westinghouse* case, Australia accorded more weight to the planned development and exploitation of its uranium resources than it did to competition policy.⁵³ In fact, it was argued by the amici in *Westinghouse* that the U.S. Executive Branch had given a similar preference to resource, energy, and defense policies over competition policy in its earlier decision to declare the U.S. uranium market partially off-limits to foreign producers.⁵⁴ In spite of this argument the U.S. courts accorded competition policy overriding importance in the litigation.⁵⁵

Consider, for example, a nation wishing to exploit a prime natural resource. It may decide, as a matter of national policy, to control the rate of extraction to correspond with planned economic growth. Assuming that the resource is an important source of foreign currency, the country may feel that its participation in whatever arrangements are possible to extract the highest possible price for the commodity are justified. The country may not have the capital or skill to extract the resource itself, or may simply prefer that the extraction be done by private enterprise. In either event, it may allow extraction by a private domestic corporation, or if there is none, it may encourage multinationals to extract and/or market the commodity. Limitations may be imposed upon the domestic or multinational corporations to insure compliance with the country's resource development policies and to guarantee the effectiveness of taxation strategies. Many of these policies or restrictions may violate the antitrust laws of the U.S. They may also have substantial adverse effects within the U.S. These effects can be engendered through the actions of private corporations rather than through the direct action of the source country. For example, in the *Westinghouse* litigation, Australia, Canada, and South Africa controlled the export of uranium in terms of quantity and price, and the defendant corporations extracted the primary resource pursuant to such controls.⁵⁶

A nation-state's sovereignty legitimizes its actions that define and implement policies in furtherance of its perceived national interest. Without the existence of an

52. See Note, *The Arab Boycott: The Antitrust Challenge of United States v. Bechtel in Light of the Export Administration Amendments of 1977*, 92 HARV. L. REV. 1440 (1979).

53. Amicus Memorandum of the Government of Australia at 2-4, *In re Uranium Antitrust Litig.*, 480 F. Supp. 1138 (N.D. Ill. 1979), *aff'd*, 617 F.2d 1248 (7th Cir. 1980).

54. "It is evident that the United States Government, by imposing the embargo, took the view that U.S. general antitrust interests in a free market in uranium should, in that instance, be subordinated to the need to protect U.S. producers from foreign competition." *Id.* at 4.

55. In rendering the default judgment Judge Marshall was influenced by "the seriousness of the charges in the complaint." *In re Uranium Antitrust Litig.* (*Westinghouse Electric Corp. v. Rio Algom Ltd.*), 1979-1 Trade Cas. (CCH) ¶ 62,657, 77,710 (N.D. Ill. 1979). Ordering production of certain documents, Judge Marshall emphasized the importance of competition to U.S. antitrust policy (*citing United States v. Topco Assoc.*, 405 U.S. 596, 610 (1972)); see *In re Uranium Antitrust Litig.*, 480 F. Supp. 1138, 1154 (N.D. Ill. 1979), *aff'd*, 617 F.2d 1248 (7th Cir. 1980).

56. Pengilley, *supra* note 8, at 852.

international consensus concerning the parameters of appropriate competition policy, conflict between national legal systems will result. The fundamental difficulty is to find a means by which the legitimate sovereign interests of affected nations can be considered in the forum court.

The conflict between nations may be greater when antitrust enforcement is initiated by private parties rather than by the government. Private parties may implicate foreign policy concerns without evaluating considerations of comity that are necessarily undertaken prior to the initiation of legal proceedings by the government. It seems clear that the specter of treble damages in private suits is far more offensive to foreign nations than any relief, civil or criminal, available to the government.⁵⁷

Application of the "rule of reason," discussed below,⁵⁸ requires U.S. courts to consider issues of comity in determining jurisdiction in private lawsuits. However, two fundamental questions are related to this analysis.

First, how are the interests of the affected nation to be presented to the forum court? Since the affected nations will not ordinarily be parties to the suit, they cannot support their position through a direct involvement in the litigation.

Historically, affected nations communicated their objections to the assertion of jurisdiction by U.S. courts to the U.S. Department of State, which then interceded, if appropriate, on behalf of the protesting nation.⁵⁹ Recently, both the Department of State and the Department of Justice have consistently encouraged affected nations to submit their positions on the issues involved in the private litigation directly to the courts as amici.⁶⁰ This procedure, however, falls far short of participation as a direct party in the litigation. Among other handicaps, affected nations are not able to develop evidence directly or adjust quickly to the changing context of a case. Instead, they are left on the periphery.

It may be argued that private defendants should be expected to develop the case

57. The following argument is typical:

Foreign criticism of the reach of U.S. antitrust jurisdiction is not new. It accompanied some of the government's anti-cartel cases in the 1940's and 1950's. However, there has been an acute rise in the level of concern and friction in recent years. Sharp protests have been addressed to the United States government and legislation has been enacted in several countries to limit discovery and/or block or nullify enforcement of U.S. judgments reached as a result of what is thought to be a too expansive view of American antitrust jurisdiction.

This increased concern can be ascribed to a number of elements, but a salient factor has been the volume and impact of private antitrust litigation. This does not mean that the reach of government enforcement is accepted. But concern about it is tempered by the fact that many other industrial nations have their own antitrust programs, and that procedures for inter-governmental consultation have been developed that assure a level of consideration of foreign interests. No such procedures, of course, apply to private litigation; and private litigants have no incentive to moderate their claims or tactics because of foreign concerns.

ABA, *Report to the House of Delegates from the International Law Committee Recommending U.S. Participation as Amicus Curiae In Certain Private Antitrust Litigation* 1-2 (April 13, 1982) [hereinafter cited as ABA Report].

58. See *infra* text accompanying notes 108-57.

59. See RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES ch. 2(A)(1) introductory note (Tent. Draft No. 2, 1981) [hereinafter cited as REVISED RESTATEMENT]. There have been five drafts of the REVISED RESTATEMENT. Citations to §§ 402-418 and §§ 441-460 refer to Tent. Draft No. 2 (1981); §§ 401, 419-420 to Tent. Draft No. 3 (1982); §§ 428-429 to Tent. Draft No. 4 (1983); and § 445 to Tent. Draft No. 5 (1984). See also letter from Roberts B. Owen, Legal Advisor, Department of State to John H. Shenefield, Associate Attorney General (March 17, 1980) (relating to the *Westinghouse* litigation) [hereinafter cited as Owen] (on file with the Ohio State Law Journal).

60. REVISED RESTATEMENT, *supra* note 59, § 403 reporter's note 6; Owen, *supra* note 59 (asking Shenefield to make known to the court the United States Government's position of encouraging foreign governments to present their views to the court as *amici curiae*).

for the affected nation; sometimes that will happen. But private defendants cannot be relied upon to advocate adequately the foreign national interests involved in every case and context. Often, the interests of the private defendant will not coincide precisely with those of the affected nation. The private defendant may even refuse to appear and may be subject to a default judgment, as happened in the *Westinghouse* litigation.

Even if an affected nation does effectively explain its interests, the second, more pragmatic problem remains: how are the interests to be evaluated by the forum court? Consider, for example, the extraction and sale of uranium. An affected nation may argue that it has the absolute right to control the rate at which uranium ore is extracted, the manner in which it is marketed, the environmental conditions under which it is mined and delivered, and possible future uses of the potentially dangerous commodity which may have, among other things, military implications. Further, the affected nation may argue that it is well within its rights to exercise control through an independent corporate agent rather than through direct governmental involvement.

In a U.S. antitrust case, these interests will be interposed against the policies underlying the antitrust laws of the U.S. The significance of American public policy, expressed by its antitrust laws, was clearly articulated by the Supreme Court in its *Topco* decision:

Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion and ingenuity whatever economic muscle it can muster.⁶¹

How are these competing interests to be balanced? The great disparity in the nature of the policies involved makes effective balancing problematic at best. How should an affected nation's policy to control the marketing and development of uranium be balanced against the value of U.S. competition policy? Evaluations of this type are fraught with political and ephemeral elements. Further, a court will have a difficult task being objective when it compares the relative values of the goals reflected in laws within its own legal system and a foreign government's policies that may impose a significant cost within the forum state. Yet, appropriate consideration must be given to the affected nation's sovereign interests.

D. *Efficient Interaction of National Legal Systems*

Significant problems handicap the efficient interaction of the legal systems of the world's sovereign nations. A standard problem in international law arises from "concurrent jurisdiction." This involves a defendant facing the dilemma of directly contradicting orders from different courts, both having personal jurisdiction over the defendant. A forum court may assert jurisdiction and enter a judgment against the

61. *United States v. Topco Assoc.*, 405 U.S. 596, 610 (1972).

defendant. Simultaneously, a court in a chartering or affected nation may refuse to implement the order or may issue a countering or preempting order.⁶²

There is no international constitution with a "full faith and credit" proviso. Cooperative interaction among national legal systems is dependent upon voluntary actions—and restraint. Variances in rules pertaining to jurisdiction, discovery, attorney's fees, damages, and evidence will complicate legal system interaction.⁶³ National courts will always be greatly influenced by the policies inherent in the substantive law of their own legal system. Forum courts can be expected to consistently undervalue the conflicting policies of other nations. Power, whether legal,⁶⁴ economic, political, or even moral, will determine the forum court's ability to enforce a judgment at odds with the interests of a foreign sovereign.

E. Conclusion

Coordinated extra-territorial application of competition law is an *essential* component of an efficient world legal system. In addition to havens resulting from conflicting national policies are what might best be described as natural havens. Certain actions carefully positioned in the air or on the seas may fall outside of the territorial jurisdiction of any authority. Cooperative extra-territoriality is required to reach these transactions, especially when they violate common legal proscriptions of the affected nations.

On the other hand, aggressive *unilateral* assertion of extra-territoriality exacerbates tensions between differing legal systems. Without the *quid pro quo* of a mutual commitment to an acceptable multilateral system, nations will naturally object to the assertion of foreign judicial authority against their nationals when important economic or political policies are involved.

Conflict of law analysis is not the panacea seen by some.⁶⁵ The generally successful U.S. experience with conflicts law has been based on a common legal heritage linked by constitutional principles and mediated by an authoritative federal Supreme Court. These ingredients are not present in the international community. Further, the conflicting policies at issue in the U.S. domestic cases (typically private tort actions in which the state government has only an indirect interest) rarely reach the significance of the affected nations' interests in cases like *Westinghouse*.

We now turn to the limiting judicial principles that have been employed by the

62. See, e.g., *United States v. Imperial Chem. Indus.*, 100 F. Supp. 504 (S.D.N.Y. 1951) (finding violation of Sherman Act); *British Nylon Spinners Ltd. v. Imperial Chem. Indus.*, Ltd. [1953] 1 Ch. 19 (Ch. Div'l Ct. 1952). The same problem was posed in *Laker Airways Ltd. v. Sabena Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984).

63. See, e.g., *Laker Airways Ltd. v. Pan Am. World Airways* (Laker v. Pan Am), 559 F. Supp. 1124, 1132-34 (D.D.C. 1983), *aff'd*, 731 F.2d 909 (D.C. Cir. 1984).

64. Legal power in this context involves the ability of the forum court to directly enforce its judgment against personnel and assets of a defendant or to induce the courts of another jurisdiction to enforce its judgment there. In its broadest sense legal power would include peripheral means of enforcing orders by the establishment of administrative restrictions on imports and other trade.

65. See Baxter, *supra* note 48; *infra* text accompanying notes 129 and note 138.

U.S. courts in determining whether to assert jurisdiction when the requisite effects are present, and evaluate them under the criteria set forth in part III of this Article.

IV. LIMITING JUDICIAL PRINCIPLES

The U.S. courts have adopted limiting judicial doctrines that circumscribe the assertion of prescriptive jurisdiction, despite the presence of substantial, direct, and foreseeable effects on U.S. commerce. As demonstrated below, these doctrines are of very limited application and have done little to resolve the concerns of foreign governments about the extra-territoriality issue or to satisfy the goals set forth in part III of this Article.

The American Law Institute (A.L.I.) has focused on the extra-territoriality issue both in its 1965 Restatement (Second) of the Foreign Relations Law of the United States⁶⁶ and more recently in its Tentative Drafts Nos. 1-5 of the Proposed Revised Restatement of the Foreign Relations Law of the United States (Revised Restatement).⁶⁷ The A.L.I. Restatements represent efforts not only to distill current judicial principles applicable to the extra-territorial application of U.S. antitrust laws, but also to articulate what those principles should be. The Revised Restatement, the A.L.I.'s most current formulation, suggests some major modifications to existing limiting judicial principles. These modifications, however, also fail to satisfy the parameters set out above.

A. *The Sovereignty-Related Defenses*

The U.S. courts have developed a number of judicial defenses applicable to cases that impinge most directly on a foreign government's sovereignty. These "sovereignty-related" defenses are the familiar doctrines of foreign sovereign immunity, act of state, and foreign sovereign compulsion.

Foreign sovereign immunity is a long-established limiting doctrine. At early common law, a foreign sovereign was considered absolutely immune from the judicial processes of another state.⁶⁸ The sole question became whether or not the defendant was actually a foreign sovereign or its agent.

As international trade developed, the operation of the doctrine produced inequities. If the doctrine applied to nationalized businesses, all commercial activities of the socialist countries would be exempt from antitrust enforcement. The same activities carried out by unsheltered private corporations, however, would be subject to enforcement.

The defense of sovereign immunity is now governed by the Foreign Sovereign Immunities Act of 1976 (FSIA).⁶⁹ The courts, regardless of their jurisdiction to prescribe, do not have jurisdiction to adjudicate a case against a sovereign or its

66. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1965) [hereinafter cited as 1965 RESTATEMENT].

67. REVISED RESTATEMENT, *supra* note 59.

68. *The Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812).

69. 28 U.S.C. §§ 1602-1611 (1982).

instrumentality.⁷⁰ The FSIA codified an exception for "commercial activity," providing that a foreign sovereign will not be immune from jurisdiction when its commercial activity has a direct effect within the U.S.⁷¹ Whether conduct qualifies as "commercial activity" is to "be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose."⁷² The precise delineation of the commercial/governmental distinction must await continued interpretation of the statute. The trend is toward narrowing the scope of this defense.⁷³

The Revised Restatement draft adopts this "restrictive theory of immunity . . . which distinguishes between 'governmental activity' (*de jure imperii*) and activities of the kind that may also be carried on by private persons (*de jure gestionis*)."⁷⁴ It deems as "commercial" activities "concerned with the production, sale, or purchase of goods; hiring or leasing of property; borrowing or lending of money; performance of or contracting for the performance of services; and similar activities" regardless of their purpose.⁷⁵

A second defense is the act of state doctrine. Under this doctrine a U.S. court is precluded from examining the validity of a foreign sovereign's public acts implemented within its own territory.⁷⁶ The rationale underlying this defense shifted from notions of sovereignty to the twin policies of separation of powers—it is the executive's role to set foreign policy—and judicial restraint in the foreign policy field.⁷⁷ While the act of state doctrine is similar to the doctrine of sovereign immunity in that it also recognizes the need to respect a foreign state's sovereignty, it is a significantly different doctrine. The law of sovereign immunity goes directly to the jurisdiction of the court. The act of state doctrine is not jurisdictional, but rather is a prudential doctrine designed to avoid judicial action in a sensitive area. Moreover, only states themselves, as defendants, may claim sovereign immunity. On the other

70. The Foreign Sovereign Immunities Act . . . in applying the restrictive theory of immunity from adjudication and permitting certain categories of suits against foreign states, assumes that foreign states are not immune from U.S. jurisdiction to prescribe the substantive law underlying those suits, and that that law was intended to apply to the foreign state defendant.

REVISED RESTATEMENT, *supra* note 59, § 445 comment (h) (Tent. Draft No. 5, 1984).

71. 28 U.S.C. § 1605(a)(2) (1982).

72. *Id.* § 1603(d).

73. In *Outboard Marine Corp. v. Pezetel*, 461 F. Supp. 384 (D. Del. 1978), the court allowed an antitrust suit to proceed against Pezetel, a Polish exporter of golfcarts, even though Pezetel was an "instrumentality" of the Polish government in the context of the nation's state-controlled economy. The court held that under FSIA a sovereign was subject to the antitrust laws when engaged in commercial activity, and assuming *arguendo* that Pezetel's acts were those of government, those acts must be characterized by reference to the transaction itself (commercial) rather than by reference to its purpose. *Id.* at 395; see Note, "Commercial Activity" in the Foreign Sovereign Immunities Act of 1976, 14 J. INT'L L. & ECON. 163 (1979).

74. REVISED RESTATEMENT, *supra* note 59, § 451 comment (a) (Tent. Draft No. 2, 1981).

75. *Id.* § 453 comment (b).

76. *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897) ("Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.").

77. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964) ("The doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere."). Although based on notions of separation of powers the defense is not constitutionally mandated. See *infra* note 247.

hand, a private litigant may invoke the act of state doctrine even when no sovereign state is a party to the action.⁷⁸

The act of state doctrine is subject to a number of qualifications that attenuate its utility as a "limiting principle." A major qualification is territorial—it applies only to the acts of a foreign state within its own territory. A second qualification is found in the need to characterize "acts" as "acts of state." Nationalization and expropriation decrees have traditionally been regarded as acts of state. However, the "mere" issuance of patents by foreign governments,⁷⁹ the enforcement of a security interest by foreign courts,⁸⁰ the procurement of discriminatory foreign legislation,⁸¹ and the withholding of a timber cutting license⁸² are not considered acts of state.

Uncertainty surrounds the existence of a third qualification. A plurality of the Supreme Court recognized an exception to the defense for purely commercial activity in *Alfred Dunhill v. Republic of Cuba*,⁸³ but only four justices concurred in that section of the opinion. The Department of Justice also adopted the position that "the act of state defense does not apply to the 'commercial' actions of a foreign government or instrumentality, but only to its public, political actions."⁸⁴

A series of recent Ninth Circuit decisions have cast some doubt on the existence of a commercial activity exception to the act of state doctrine. In *International Association of Machinists v. The Organization of Petroleum Exporting Countries (OPEC)*⁸⁵ the Ninth Circuit held that "[t]he act of state doctrine is not diluted by the commercial activity exception which limits the doctrine of sovereign immunity."⁸⁶ The Ninth Circuit has since retreated from that extreme position, stating in its most recent decision that "the Ninth Circuit has not definitively ruled on the commercial exception."⁸⁷ The court's more recent position may reflect the mod-

78. See, e.g., *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir.), cert. denied, 434 U.S. 984 (1977).

79. *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1294 (3d Cir. 1979).

80. *Timberlane Lumber v. Bank of Am.*, 549 F.2d 597, 608 (9th Cir. 1976).

81. *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927).

82. *Industrial Inv. Dev. Corp. v. Mitsui & Co.*, 594 F.2d 48 (5th Cir. 1979), cert. denied, 445 U.S. 903 (1980).

83. 425 U.S. 682, 695 (1976) (Justice White wrote: "the concept of an act of state should not be extended to include the repudiation of a purely commercial obligation owed by a foreign sovereign or by one of its commercial instrumentalities.").

84. D.O.J. GUIDE, *supra* note 21, at 55.

85. 649 F.2d 1354 (9th Cir. 1981), cert. denied, 454 U.S. 1163 (1982).

86. *Id.* at 1360. The court reasoned:

While purely commercial activity may not rise to the level of an act of state, certain seemingly commercial activity will trigger act of state considerations. . . . While the FSIA ignores the underlying purpose of a state's action, the act of state doctrine does not. . . . When the state *qua state* acts in the public interest, its sovereignty is asserted. The courts must proceed cautiously to avoid an affront to that sovereignty. Because the act of state doctrine and the doctrine of sovereign immunity address different concerns and apply in different circumstances, we find that the act of state doctrine remains available when such caution is appropriate, regardless of any commercial component of the activity involved.

Id. (footnotes omitted).

87. *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d 404 (9th Cir. 1983), cert. denied, 104 S. Ct. 703 (1984); see also *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030 (9th Cir. 1983). The court in *Clayco* noted that "[t]he *Dunhill* plurality emphasized that a commercial exception is appropriate in situations where governments are not exercising power peculiar to sovereigns." 712 F.2d 404, 408 (9th Cir. 1983). However, the commercial exception would not be applicable to the "[g]ranting [of] a concession to exploit natural resources [which] entails an exercise of powers peculiar to a sovereign." *Id.* at 408. The act of state doctrine has been successfully invoked in only three antitrust cases, all relating to oil. In *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92 (C.D. Cal. 1971), *aff'd*, 461 F.2d 1261 (9th Cir.), cert. denied, 409 U.S. 950 (1972), plaintiffs alleged that the sovereign issued a fraudulent

erating effects of its subsequent adoption of the rule of reason analysis discussed below.⁸⁸

The *OPEC* case is of special interest because it represents the most extreme attempt to apply U.S. antitrust laws extra-territorially. Such an application was avoided only by the Ninth Circuit's creative application of the act of state doctrine. The *OPEC* case involved an antitrust challenge, by an American labor union, to the international oil cartel established by OPEC and its member nations. The appellate court held that the case was properly dismissed under the act of state doctrine.⁸⁹ The court found that OPEC's price-fixing activity, although commercial, had a significant sovereign component.⁹⁰ Furthermore, the availability of oil had become a significant factor in international relations, and there was no international consensus condemning cartels, royalties, and production agreements, especially when a prime natural resource like oil was involved.

One final issue remains regarding the scope of the act of state defense. The Second Circuit, on the premise that to prove damages an antitrust plaintiff must show that *but for* the conspiracy the foreign government would not have acted as it did, held in *Hunt v. Mobil Oil Corp.*⁹¹ that this evidentiary requirement would justify extending the act of state doctrine to preclude an inquiry into the *motivation* as well as the *validity* of the foreign state's action.⁹² The Fifth Circuit criticized *Hunt* in *Industrial Investment Development Corp. v. Mitsui & Co.*⁹³ The Fifth Circuit not only disagreed with the underlying premise of *Hunt* that a plaintiff must prove defendants were the sole cause to establish a causal relation for purposes of proving damages, but went on to rule that: "Furthermore, we disagree that motivation and validity are equally protected by the act of state rubric. . . . Precluding all inquiry into the motivation behind or circumstances surrounding the sovereign act would uselessly thwart legitimate American goals where adjudication would result in no embarrassment to executive department action."⁹⁴

territorial decree to enable defendants, in the place of plaintiffs, to exploit oil and gas in the area covered by the decree. In *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir. 1977), *cert. denied*, 434 U.S. 984 (1978), Nelson Bunker Hunt claimed that the defendant conspired with other major oil companies to cause the Libyan government to nationalize Hunt's oil production rights. Both cases involved expropriation by a foreign state, the classic situation for the invocation of the act of state doctrine. In the third case, *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d 404 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 703 (1984), plaintiffs alleged that the defendants conspired to deprive plaintiffs of an oil concession by bribing officials of Umm Al Qaywayn.

88. See *infra* text accompanying notes 108-115.

89. 649 F.2d 1354, 1361 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982).

90. *Id.* at 1360.

91. 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977).

92. *Id.* at 76-78.

93. 594 F.2d 48, 55 (5th Cir. 1979), *cert. denied*, 445 U.S. 903 (1980). In *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d 404 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 703 (1984), a case that involved allegations of bribery, the Ninth Circuit rejected Clayco's claim that the court should not invoke the act of state doctrine "because the concern here is the motivation behind the sovereign's act, rather than its legal validity." *Id.* at 407. The Ninth Circuit, reviewing *Mitsui*, held that:

[I]t does not foreclose application of the act of state doctrine to cases where motivation but not validity must be scrutinized. Rather, *Mitsui* holds that where the motivation for the sovereign act would be subject to a limited examination in order to measure the plaintiff's damages, and the adjudication "would result in no embarrassment to executive department action," inquiry is not foreclosed by the act of state doctrine. In this case, however, the very existence of plaintiffs' claim depends upon establishing that the motivation for the sovereign act was bribery, thus embarrassment would result from adjudication.

Id. (citations omitted).

94. 594 F.2d 48, 55 (5th Cir. 1979), *cert. denied*, 445 U.S. 903 (1980) (citation omitted).

The Revised Restatement does little to clarify or modify the scope of this defense. It adopts the traditional formulation of the act of state doctrine, including its rigid territorial limitation that it applies only to "act[s] of a foreign state . . . within the state's own territory."⁹⁵ It also does not attempt to resolve the two outstanding issues with respect to this defense: the existence of a "commercial activities" exception⁹⁶ and whether the act of state doctrine forecloses review of the *motivation* for the sovereign's public acts as well as the *validity* of its actions.⁹⁷

A corollary to the act of state defense is the foreign compulsion defense—that private conduct in foreign territory compelled by a foreign sovereign should be treated as an act of the state itself and protected from antitrust liability. The argument is premised on the twin notions of sovereignty and fairness. In *Intramerican Refining Corp. v. Texaco Maracaibo, Inc.*,⁹⁸ defendants allegedly refused to sell Venezuelan crude oil to plaintiff, a U.S. importer and refiner.⁹⁹ The Venezuelan government's imposition of a boycott forbidding crude oil sales was held to constitute a complete defense.¹⁰⁰ The *Texaco Maracaibo* case represents the only successful invocation of this defense to date. It should be noted that the Department of Justice takes the position that *Texaco Maracaibo* was wrongly decided, in part because the conduct on

95. REVISED RESTATEMENT, *supra* note 59, § 428 (Tent. Draft No. 4, 1983). Section 428 provides that "the United States will refrain from examining the *validity* of an act of a foreign state taken in its sovereign capacity within the state's own territory." (emphasis added). The REVISED RESTATEMENT thus incorporates the two primary limitations to the availability of the defense. First, the acts of the sovereign must be public acts "such as constitutional amendments, statutes, decrees and proclamations, and possibly . . . physical acts such as occupation of an estate by the state's armed forces in application of state policy." *Id.* comment (g). Second is the rigid territorial limitation: "It is clear that the act of state doctrine applies only to acts of a foreign state within its own territory." *Id.* comment (a)(i). See also *id.* reporter's note 7.

96. The reporter's notes, referring to the plurality opinion in *Alfred Dunhill v. Republic of Cuba*, 425 U.S. 682 (1976), noted that one reason for recognizing a commercial activities exception is "the fact that in commercial dealings, as contrasted with matters such as expropriation, there is a broad international consensus as to the applicable rules of law." REVISED RESTATEMENT, *supra* note 59, § 428 reporter's note 5. The reporter appears to distinguish *International Ass'n of Machinists v. The Org. of Petroleum Exporting Countries*, 649 F.2d 1354 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982) (see *supra* text accompanying notes 85–87), asserting that the Ninth Circuit invoked the defense "since OPEC and its activities 'are carefully considered in the formulation of American foreign policy,' and since any relief granted to plaintiffs 'would in effect amount to an order from a domestic court instructing a foreign sovereign to alter its chosen means of allocating and profiting from its own valuable natural resources.'" REVISED RESTATEMENT, *supra* note 59, § 428 reporter's note 5. Experience in antitrust litigation demonstrates the absence, not the presence, of "a broad international consensus as to the applicable rules of law" in commercial dealings. OPEC clearly involved "commercial activities"—price fixing and regulation of output—and the court there noted the absence of an international consensus regarding the legality of such activities in the context of prime natural resources. *International Ass'n of Machinists v. The Org. of Petroleum Exporting Countries*, 649 F.2d 1354, 1361 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982).

97. Section 428, by its terms, speaks only of validity. But reporter's note 10 implies that review of motivation may also be precluded:

When the causal chain between defendant's alleged conduct and plaintiff's injury could not be determined without an inquiry into the motives of the foreign government, the defense has been successful and the cause of action has been dismissed. *Occidental Petroleum Corporation v. Buttes Gas & Oil Co.*, 331 F. Supp. 92 (C.D. Cal. 1971), *aff'd*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972); *Hunt v. Mobil Oil Corporation*, 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977); *Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum*, 577 F.2d 1196 (5th Cir. 1978), *cert. denied*, 442 U.S. 928 (1979). When defendant's conduct could be judged without scrutiny of the acts or motives of the foreign government, the act of state doctrine has not been applied. *Timberlane Lumber Co. v. Bank of America National Trust & Savings Assoc.*, 549 F.2d 597 (9th Cir. 1976); *Mannington Mills, Inc. v. Congoleum Corporation*, 595 F.2d 1287 (3d Cir. 1979); *Industrial Investment Development Corporation v. Mitsui & Co., Ltd.*, 594 F.2d 48 (5th Cir. 1979), *cert. denied*, 445 U.S. 903 (1980).

98. 307 F. Supp. 1291 (D. Del. 1970).

99. *Id.* at 1292–93.

100. *Id.* at 1298.

which the complaint was based (refusal to deal with plaintiff) took place in the U.S., and the defense exists only for acts compelled within the foreign government's own territory.¹⁰¹

Presumably, the compulsion must occur through an action that would qualify as an affirmative act of state. Mere approval after the fact of an illegal action will not invoke the doctrine.¹⁰² Also, the defendant must be coerced and cannot be in a position in which it could refuse to comply.¹⁰³ The Revised Restatement's version of the foreign government compulsion defense¹⁰⁴ again fails to address the shortcomings of this defense. It retains the basic requirements that the defense be limited territorially¹⁰⁵ and that the acts be "compelled" by the sovereign.¹⁰⁶

The trend has been to limit the ability of defendants in extra-territorial suits to invoke the three traditional doctrines of sovereign immunity, act of state, and foreign

101. D.O.J. GUIDE, *supra* note 21, case K, at 50-52. The REVISED RESTATEMENT concurs with the conclusion of the Department of Justice that *Texas Maracaibo* was incorrectly decided. REVISED RESTATEMENT, *supra* note 59, § 419 reporter's note 5 (Tent. Draft No. 3, 1982).

102. *United States v. Sisal Sales Corp.*, 274 U.S. 268, 276 (1927).

103. *United States v. Watchmakers of Switzerland Information Center*, 1963 Trade Cas. (CCH) ¶ 70,600 (S.D.N.Y. 1962), *order modified*, 1965 Trade Cas. (CCH) ¶ 71,352 (S.D.N.Y. 1965).

104. REVISED RESTATEMENT, *supra* note 59, § 419 (Tent. Draft No. 3, 1982). Section 420 deals with the specific application of the foreign compulsion defense in the context of discovery jurisdiction. It provides that when a party is subject to a discovery order by the forum nation and to a blocking statute or its equivalent by the affected nation there may be a qualified defense. The party subject to a blocking statute or its equivalent may be required to make a good faith effort to secure permission from the foreign authorities to make the information available, and even when such good faith efforts have failed the court may, in appropriate cases, make findings of fact adverse to that party. *Id.* § 420(2). This is justified on the grounds that an adverse finding "is not deemed to be a penalty for conduct commanded by a foreign state, but is designed rather as a form of pressure to induce compliance with justified requests for information." *Id.* § 420 comment (c).

105. *Id.* § 419 comment (b).

106. The REVISED RESTATEMENT places heavy emphasis on the element of compulsion, which exists "only when the other state's requirements are embodied in binding laws or regulations subject to penal or other severe sanction." *Id.* § 419 comment (c). The comment makes clear that this is a particularly difficult hurdle to overcome in the antitrust context:

Numerous arrangements, seen by plaintiffs in U.S. antitrust cases as anticompetitive combinations, have been viewed by defendants (and sometimes by foreign governments as well) as arrangements required or directed by foreign states and therefore immune from antitrust liability in the United States. In order for the foreign compulsion defense to be effective, however, it is not enough that the government of a foreign state tolerated or licensed the activity at issue, that it gave an exclusive franchise to a participant in a combination, or even that a foreign state-owned entity itself participated in the activity. To prevail under the government compulsion defense, defendants must establish that the activity on which liability is sought to be based was required by the foreign state.

Id. § 419 comment (d). The reporter's notes specifically apply § 419 to the *Westinghouse* litigation with the following results:

In a series of lawsuits growing out of the establishment of an international uranium cartel in the 1970's, several parties raised the defense that participation of all Canadian uranium producers in the cartel was a matter of national policy required by the government of Canada. As of 1981 there had been no definitive ruling on the defense, because it had become intertwined in several courts with controversies about discovery of information located outside the United States. . . . [T]he defense of government compulsion would prevail only on a showing that the government of Canada required all producers in that country to join the cartel, on penalty of criminal sanction, risk of losing their mining rights or similar threats. A showing that the government of Canada had (i) known about and acquiesced in the cartel; (ii) favored and supported the cartel as a matter of policy; and (iii) itself owned one or more participants in the cartel (crown corporations) would not be sufficient to establish the defense of government compulsion in the United States under this section. The facts cited might, however, be relevant under § 403 on the issue of the reasonableness of application of United States law, as well as on the appropriateness of any remedy or sanction.

Id. § 419 reporter's note 4 (citations omitted).

government compulsion.¹⁰⁷ Thus, these defenses alone cannot avoid a conflict when a foreign government is sued because of commercial activities, or when a private party is sued and the challenged conduct was encouraged by that foreign government.

B. The "Rule of Reason"

In seminal decisions, two U.S. circuit courts have held that the "effects test" limited by the sovereignty-related defenses approach is inadequate, and that additional factors should be considered when a court is deciding whether to assert subject matter jurisdiction. The first of these decisions, *Timberlane Lumber Co. v. Bank of America*,¹⁰⁸ was rendered in 1976, although the balancing test contained therein was suggested almost twenty years earlier by Kingman Brewster¹⁰⁹ and was included in the 1965 Restatement.¹¹⁰

In *Timberlane* the primary plaintiff, an American partnership engaged in the

107. A fourth possible defense is the *Noerr-Pennington* doctrine. See *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972); *United Mine Workers (UMW) v. Pennington*, 381 U.S. 657 (1965); *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). Under this doctrine, "[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition." *UMW v. Pennington*, 381 U.S. 657, 670 (1965). This applies to the "petitioning" of any branch of the government. This immunity does not extend, however, to conduct ostensibly directed toward influencing the government, but which is in reality "a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor." *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144 (1961). Courts and commentators are divided on the issue of whether this immunity applies to efforts to influence foreign governments. For example, it has been held in the Ninth Circuit that the *Noerr* immunity does *not* apply extra-territorially. *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92 (C.D. Cal. 1971), *aff'd*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972). The court reasoned that *Noerr* rested on the first amendment and on the need for a representative democracy to keep in touch with its constituents. Thus, "[t]he constitutional freedom 'to petition the Government' carries limited if indeed any applicability to the petitioning of foreign governments," especially when, as in that case, the "persuasion" of the foreign government "is a far cry from the political process with which *Noerr* was concerned." *Id.* at 107-08. The Fifth Circuit, on the other hand, has held that the *Noerr* immunity does apply to attempts to influence foreign governments. *Coastal States Mkt., Inc. v. Hunt*, 694 F.2d 1358, 1365 (5th Cir. 1983). The court concluded that "*Noerr* was based on a construction of the Sherman Act. It was not a first amendment decision." *Id.* at 1364-65 (footnotes omitted). The court wrote:

The Sherman Act, as interpreted by *Noerr*, simply does not penalize as an antitrust violation the petitioning of a government agency. We see no reasons why acts that are legal and protected if done in the United States should in a United States court become evidence of illegal conduct because performed abroad. We also reject the idea that the availability of petitioning immunity turns on the political "persuasion" of the government involved. The political character of the government to which the petition is addressed should not taint the right to enlist its aid.

Id. at 1366-67 (footnotes omitted). The Supreme Court has not yet spoken directly to the issue. However, in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1972), the Supreme Court reversed a jury verdict for the defendants, stating that "*Noerr* . . . is plainly inapposite." *Id.* at 707. Because the Court distinguished the *Noerr* doctrine, rather than holding it inapplicable, it has been argued that the Court decided *sub silentio* that it does apply. See Graziano, *Foreign Governmental Compulsion as a Defense in United States Antitrust Law*, 7 VA. J. INT'L L. 100, 132 (1967); see also *Industrial Inv. Dev. Corp. v. Mitsui & Co.*, 671 F.2d 876, 882 & n.6 (5th Cir. 1982). The Department of Justice also takes the position that the doctrine is not limited to domestic litigation. D.O.J. GUIDE, *supra* note 21, at 62-63.

108. 549 F.2d 597 (9th Cir. 1976).

109. K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD 446 (1958).

110. 1965 RESTATEMENT, *supra* note 66. Section 40 of the 1965 RESTATEMENT proposes that the courts consider the following criteria:

(a) vital national interests of each of the states;
 (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person;
 (c) the extent to which the required conduct is to take place in the territory of the other state;
 (d) the nationality of the person; and
 (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.

purchase and wholesaling of lumber, alleged that the San Francisco-based Bank of America conspired with a number of Honduran companies to freeze plaintiff out of the Honduran lumber market by foreclosing, in a Honduran court, on a Honduran lumber company acquired by Timberlane.¹¹¹ In its antitrust suit Timberlane alleged that U.S. commerce was affected because Timberlane intended to export part of the Honduran lumber to the U.S. The district court dismissed the antitrust claims under the act of state doctrine.

The Ninth Circuit, in a decision by Judge Choy, reversed and remanded. Judge Choy suggested a "tripartite" jurisdictional test: first, "the antitrust laws require . . . that there be *some* effect—actual or intended—on American foreign commerce before the federal courts may legitimately exercise subject matter jurisdiction under those statutes."¹¹² The second factor, which breaks down the effects test into a quantitative dimension, is essentially a test of standing: "Second, a greater showing of burden or restraint may be necessary to demonstrate that the effect is sufficiently large to present a cognizable injury to the plaintiffs and, therefore, a civil violation of the antitrust laws."¹¹³ The third factor, which considers qualitative aspects, is prophylactic and multidimensional: "Third, there is the additional question which is unique to the international setting of whether the interests of, and links to, the United States—including the magnitude of the effect on American foreign commerce—are sufficiently strong, vis-a-vis those of other nations, to justify an assertion of extraterritorial authority."¹¹⁴ Expanding on this third part of the test the court then invoked Kingman Brewster's jurisdictional rule of reason balancing approach and considered the following factors:

[T]he degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.¹¹⁵

On remand, the district court dismissed Timberlane's action under this rule of reason analysis.¹¹⁶ The trial court first looked to the anticompetitive effects of defendants' action, "including whether they occurred in the U.S. or in Honduras; whether the markets affected were in the U.S. or abroad; and whether any indirect anticompetitive effects in the U.S. or abroad were foreseeable or intended."¹¹⁷ The

111. Timberlane had acquired a financially ailing company called Lima. Bank of America allegedly filed lawsuits in Honduras through its Honduran subsidiary, obtaining a Honduran court order enforcing an outstanding security interest and having the Honduran government seize Lima's plant. *Timberlane Lumber v. Bank of Am.*, 549 F.2d 597, 601-05 (9th Cir. 1976).

112. *Id.* at 613 (emphasis in original).

113. *Id.*

114. *Id.*

115. *Id.* at 616.

116. *Timberlane Lumber v. Bank of Am.*, 574 F. Supp. 1453 (N.D. Cal. 1983). This case was recently affirmed by the Ninth Circuit. *Timberlane Lumber v. Bank of Am.*, No. 83-2008 (9th Cir. Dec. 27, 1984). See 48 ANTITRUST & TRADE REG. REP. (BNA) No. 1197, at 87 (Jan. 10, 1985).

117. *Id.* at 1465.

court found the Ninth Circuit's "very low threshold" effects test barely satisfied.¹¹⁸ The court then looked to the relationship between plaintiff's suit and the forum, and considered "whether U.S. citizenship of, or ownership interests in, the plaintiff are significant factors militating our jurisdiction, or whether the plaintiff's access to or recourse in a foreign court has provided it meaningful opportunities for redress of its allegations."¹¹⁹ The court found plaintiff's links to the U.S. insignificant, and further found that the Honduran courts had provided plaintiff with adequate recourse.¹²⁰ The court finally considered the effect of the lawsuit on U.S. foreign policy, looking at both "the anticipatable annoyance or infringement that Honduras might feel if rulings in this matter were to have the effect, *albeit* indirectly, of rendering an 'advisory' judgment on the state of their domestic lumber industry; and the broader implications of an unwarranted export of our antitrust laws to Honduras."¹²¹ The court found the anticipated infringement on Honduras' highly regulated timber industry, a prime natural resource, to be great. The broader implications of the extra-territorial application of U.S. antitrust laws were unclear.¹²²

In the second case, *Mannington Mills, Inc. v. Congoleum Corp.*,¹²³ the Third Circuit also adopted a comity analysis, balancing a number of disparate factors. In *Mannington Mills* both the plaintiff and defendant were in the business of manufacturing vinyl floor covering. Mannington alleged that Congoleum fraudulently

118. The trial court found that plaintiffs had just adequately alleged *some* unintended effect upon U.S. foreign commerce, finding that plaintiffs were "potential competitors" in the markets that they alleged were actually, or were intended to be, rendered anticompetitive—supplying lumber to two submarkets in the U.S.:

Here, given the indisputably nascent efforts of the plaintiffs to establish a chain of somewhat related enterprises to produce lumber in Honduras, with an eye to eventual export, if ever legally and commercially feasible, the directly anticompetitive effect of the Bank's decision to liquidate Lima's indebtedness was felt in the marketplace in which the Lima assets supplied lumber: Honduras and, to a far less degree, the Caribbean. Although Lima and the Timberlane entities may have consummated some sales in Puerto Rico and negotiated toward others in Florida, any effect that Lima's demise had upon competitive conditions in the U.S. foreign was *de minimis*.

. . . The minimal commercial opportunity for Honduran lumber in the U.S. is important to our assessment of whether the Bank's actions could have been intentionally directed at, or their effect predictable upon, U.S. commerce in lumber.

Id. at 1470 (footnotes omitted). This failure to satisfy the "effects" test may have been the real reason for dismissal.

119. *Id.* at 1465. The court further noted:

[T]he true nature of the complaint is an action in tort and contract by the Limas against certain personnel of the Bank's branch in Honduras. At best, the United States citizens' interests in the matter are derivative: Timberlane to the Lima concern, Bank of America in San Francisco, as the parent corporation. All of the crucial percipient witnesses to the incidents were either Honduran citizens or residents; almost all of the events which form the basis of this suit occurred in Honduras.

Id. at 1469–70.

120. The court noted that Lima, not Timberlane, was within the "'target area' of anticompetitive animus," and that Timberlane's claims were derivative so that there was a possibility of duplicate recovery and complex damage apportionment. *Id.* at 1468. The court noted that treble damages in this case would penalize the bank only for its status as a U.S. national. The court also noted that treble damages would subject all multinationals to multiple liability, especially to liability under U.S. laws, provided a U.S. entity could be found. *Id.*

121. *Id.* at 1465 (footnotes omitted).

122. The court also noted the submission of a Diplomatic Note by Honduras that "expresse[d] some concern" about the American lawsuit. *Id.* at 1465 n.31. The court then concluded that consideration of Timberlane's allegations would "create needless tensions." "[T]he U.S. Court would by necessity have to overlook the practical sensitivity of our interference, which in any degree, would be superfluous, *with an industry heavily regulated by another sovereign state*, as well as in an internal incident which has already consumed extensive Honduran judicial resources." *Id.* at 1471 (emphasis added).

123. 595 F.2d 1287 (3d Cir. 1979).

obtained and enforced patents in twenty-six foreign countries, restricting the foreign business of Mannington in violation of section 2 of the Sherman Act.¹²⁴ The trial court dismissed on the basis of the act of state doctrine. The Third Circuit reversed the trial court's holding,¹²⁵ finding the act of state doctrine inapplicable, and remanded for a "rule of reason" analysis. The Third Circuit found itself in "substantial agreement" with the *Timberlane* court. However, the Third Circuit proposed a slightly different list of factors to be considered in the balancing process:

1. Degree of conflict with foreign law or policy;
2. Nationality of the parties;
3. Relative importance of the alleged violation of conduct here compared to that abroad;
4. Availability of a remedy abroad and the pendency of litigation there;
5. Existence of intent to harm or affect American commerce and its foreseeability;
6. Possible effect upon foreign relations if the court exercises jurisdiction and grants relief;
7. If relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries;
8. Whether the court can make its order effective;
9. Whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances;
10. Whether a treaty with the affected nations has addressed the issue.¹²⁶

The Supreme Court has not yet ruled on this "rule of reason" analysis. However, many commentators have embraced this additional limiting doctrine.¹²⁷ The Antitrust Division's Guide for International Operations implicitly adopts the balancing approach,¹²⁸ although it does not expressly refer to either decision. Current and past Department officials have also endorsed the position that conflicts of laws analysis and principles of comity should be brought to bear in cases in which jurisdiction is claimed over acts occurring abroad.¹²⁹

The "rule of reason" approach, however, is not universally acclaimed. In *Westinghouse*, for example, the Seventh Circuit affirmed the lower court's assertion of jurisdiction even though the lower court declined to apply a "rule of reason" analysis.¹³⁰

The overlapping but not identical formulations of the relevant criteria proposed by the circuit courts in *Timberlane* and *Mannington Mills* are extremely general and

124. *Id.* at 1290.

125. The court held that the mere issuance of patents could not be considered an "act of state." *Id.* at 1293-94.

126. *Id.* at 1297-98.

127. See, e.g., 1 P. AREEDA & D. TURNER, ANTITRUST LAW § 239 (1978).

128. D.O.J. GUIDE, *supra* note 21, at 6-7 ("[T]he U.S. antitrust laws should be applied to an overseas transaction when there is a substantial and foreseeable effect on the United States commerce; and, consistent with these ends, it should avoid unnecessary interference with the sovereign interests of foreign nations.").

129. Rosenthal, *An Overview of the Guide and its Objectives*, in PERSPECTIVES ON THE EXTRATERRITORIAL APPLICATION OF U.S. ANTITRUST AND OTHER LAWS 87-89 (J. Griffin ed. 1979); Hawk, *Special Defenses and Issues, Including Subject Matter Jurisdiction, Act of State Doctrine, Foreign Government Compulsion and Sovereign Immunity*, 50 ANTITRUST L.J. 559, 562 (1981).

130. *In re Uranium Antitrust Litig.*, 480 F. Supp. 1138, 1148 (N.D. Ill. 1979), *aff'd*, 617 F.2d 1248, 1255-56 (7th Cir. 1980).

abstract. Moreover, no guidance is provided on the relative weight to be given the various factors.

The criteria identified by the courts can be separated into three basic categories: legal, economic, and political.

LEGAL	ECONOMIC	POLITICAL
conflict with foreign law	effect within U.S.	conflict with foreign policy
nationality of parties	foreseeability of effect	effect of asserting jurisdiction on foreign relations
availability of a remedy abroad and pendency of litigation there		relative importance of effect within U.S. vs. foreign country
whether remedy can be enforced		relative importance of conduct within U.S. vs. foreign country
whether issue is covered by treaty		
conduct within U.S.		
purpose to harm U.S. trade		

Courts have a great deal of experience in dealing with economic questions. By definition they are authoritative regarding legal questions. The critical unresolved issue involves the political questions and their appropriate resolution.

Courts will have no reference points when analyzing the political questions. Precedent is of little value because foreign relations and policies constantly shift and change. Without the availability of legislative or judicial guideposts, the trial courts will create their own foreign policy. As currently structured, there will be no controls to insure that judicial foreign policy is consistent with the foreign policy of the executive branch.

The *Mannington Mills* case provides a prime example of the impossible task set before the federal district courts. In *Mannington Mills* the district court was instructed upon reversal to apply the balancing test *in seriatim* to the patent laws of twenty-six foreign countries. Affected nations might not react favorably to an outcome in which U.S. antitrust law is held to be superior to the patent laws of fifteen of the foreign nations but inferior to the other eleven. Such a listing of preferred and less preferred foreign interests would more likely increase, not decrease, international conflicts.

Additionally, it is unclear whether this "rule of reason" should be treated as "jurisdictional" or "discretionary." In a concurring opinion in *Mannington Mills* Judge Adams argued that the test established in *Timberlane* is a test of subject matter jurisdiction.¹³¹ Most commentators and courts, and the 1965 Restatement, view the rule of reason as nonjurisdictional, to be applied as a matter of comity.¹³²

131. 595 F.2d 1287, 1300-02 (3d Cir. 1979) (Adams, J., concurring).

132. 1965 RESTATEMENT, *supra* note 66, § 40; *see, e.g.*, Hawk, *supra* note 129, at 662.

Concerning who should carry the burden of proof on these issues, Brewster proposed that "[t]he burden of establishing any of these jurisdictional requirements should be borne by the plaintiff. When more than one element is involved, proof of one of these should not operate to raise a presumption that the other exists."¹³³ While at least one court has put the burden of proof on the plaintiff,¹³⁴ the Fifth Circuit placed the burden on the defendant.¹³⁵

The Revised Restatement proposes several modifications to this rule of reason analysis. It combines the "effects principle" with the "principle of reasonableness" and articulates a single jurisdictional standard¹³⁶ for the extra-territorial application of U.S. laws. It also reformulates the factors to be considered by the courts. The "effects principle," as set out in section 402 of the Revised Restatement, provides that a state may "exercise jurisdiction to prescribe and apply its law with respect to . . . conduct outside its territory which has or is intended to have substantial effect within its territory."¹³⁷ This is a very broad articulation of the test, since it allows a finding of jurisdiction upon a showing of either actual *or* intended effects. On the other hand, the "principle of reasonableness" found in section 403 is a limiting doctrine. Section 403(2) requires a court to evaluate "all the relevant factors" including:

- (a) the extent to which the activity (i) takes place within the regulating state, or (ii) has substantial, direct, and foreseeable effect upon or in the regulating state;
- (b) the links, such as nationality, residence, or economic activity, between the regulating state and the persons principally responsible for the activity to be regulated, or between that state and those whom the law or regulation is designed to protect;
- (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
- (d) the existence of justified expectations that might be protected or hurt by the regulation in question;
- (e) the importance of regulation to the international political, legal or economic system;
- (f) the extent to which such regulation is consistent with the traditions of the international system;
- (g) the extent to which another state may have an interest in regulating the activity;
- (h) the likelihood of conflict with regulation by other states.¹³⁸

This list of factors is "not exhaustive" and "[t]he weight to be given to any particular factor or group of factors will depend on all the circumstances."¹³⁹ The Revised Restatement also proposes in section 403(3) that the courts apply a com-

133. K. Brewster, *supra* note 109, at 448.

134. *Timberlane Lumber v. Bank of Am.*, 574 F. Supp. 1453, 1461 (N.D. Cal. 1983).

135. *Industrial Inv. Dev. Corp. v. Mitsui & Co.*, 671 F.2d 876 (5th Cir. 1982), *vacated on other grounds*, 103 S. Ct. 1244, *aff'd on remand*, 704 F.2d 785 (5th Cir. 1983).

136. REVISED RESTATEMENT, *supra* note 59, § 403 reporter's note 10.

137. *Id.* § 402 (Tent. Draft No. 2, 1981).

138. *Id.* § 403(2). These factors are derived, in part, from § 40 of the 1965 RESTATEMENT, and in part, from § 6 of the RESTATEMENT (SECOND) OF CONFLICTS OF LAWS [hereinafter cited as CONFLICTS RESTATEMENT]. Reliance on the CONFLICTS RESTATEMENT reflects the trend toward viewing the extra-territoriality issue as one of conflicts of law.

139. REVISED RESTATEMENT, *supra* note 59, § 403 comment (b) (Tent. Draft No. 2, 1981).

parative test of reasonableness in cases of "concurrent jurisdiction," when two states having jurisdiction to prescribe with respect to the same party under section 403(2) issue contradictory commands to that party.¹⁴⁰

Although the drafters, in the official comments and reporter's notes to sections 402 and 403, specifically referred to applications of the Revised Restatement's principles to antitrust law, they also included a specific antitrust section—section 415. Subsection (2) provides that U.S. antitrust laws may be applied extra-territorially "if a *principal purpose* of the conduct or agreement [in restraint of trade] is to interfere with the commerce of the United States, *and* the agreement or conduct has *some effect* on that commerce."¹⁴¹ No separate reasonableness analysis is to be applied here because "where restraint of United States trade is a principal purpose of an agreement or conduct, United States jurisdiction to prescribe and apply its law is clear and clearly reasonable under § 403."¹⁴² Otherwise, jurisdiction may be asserted under subsection (3) "if such agreement or conduct has *substantial* effect on the commerce of the United States and the exercise of jurisdiction is not unreasonable under § 403(2) and (3)."¹⁴³ Here, the "principle of reasonableness" is to be applied in the following manner:

The criteria set forth in § 403 and illustrated in this section are to be applied in light of the purpose which the law in question is designed to achieve. For example, a principal purpose of section 1 of the Sherman Act, 15 U.S.C. § 1, is prevention of price fixing in the United States market; protection of the United States market against price fixing, therefore, is an interest entitled to great weight, even if the overt activity took place outside of the United States by persons not nationals of the United States. In contrast, section 7 of the Clayton Act, 15 U.S.C. § 18, is designed to prevent concentration of power in the United States, and the interest of the United States in preventing the merger of two foreign firms, only because each of them is engaged in some line of commerce in some section of the United States, would have much less weight. Similarly, participation in a world-wide conspiracy to divide markets might engage U.S. interests more heavily than would a failure to comply with pre-merger notification requirements under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 14 U.S.C. § 18a.¹⁴⁴

140. *Id.* § 403(3). Specific applications of § 403(3) are found in § 419 dealing with the foreign government compulsion defense and § 420(2) dealing with the enforcement of discovery orders in foreign countries or against foreign nationals when compliance is prohibited by that foreign nation.

141. *Id.* § 415(2) (emphasis added).

142. *Id.* § 415 comment (a).

143. *Id.* § 415(3) (emphasis added).

144. *Id.* § 415 comment (c). The reporter's notes make specific reference to application of the principle of reasonableness to the *Westinghouse* litigation:

In applying the principle of reasonableness, the exercise of criminal jurisdiction in relation to acts committed in the territory of another state may be perceived as particularly intrusive upon that state's sovereignty. See, e.g., the reaction of the House of Lords, and particularly the speech of Viscount Dilhorne, to participation by the U.S. government in the effort by the Westinghouse Corporation to take the testimony of British witnesses to an alleged conspiracy to fix the price of uranium. In re *Westinghouse Uranium Contract*, [1978] 2 W.L.R. 81, esp. at 107-108 (H.L.(E)). It is generally accepted by enforcement agencies of the United States government that criminal jurisdiction over activity with substantial foreign elements should be exercised more sparingly than civil jurisdiction over the same or comparable activity, and only upon strong justification. No case is known of criminal prosecution in the United States for an economic offense (not involving fraud) carried out by an alien wholly outside the United States.

Id. § 403 reporter's note 7.

The Revised Restatement thus contains yet another, different formulation of the criteria to be considered when courts apply the "rule of reason." The Restatement places significantly greater emphasis on international interests and norms than do the *Timberlane* and *Mannington Mills* approaches.

Under the Revised Restatement approach, a court would first look to the interests of the *forum* (referred to in the Revised Restatement as the "regulating") state.¹⁴⁵ The Restatement proposes evaluating the forum nation's interest in the specific activity in terms of the gravity of the offense under international norms.¹⁴⁶ This approach, in the abstract, is more meaningful; the customary evaluation of U.S. interests when the U.S. is the forum nation simply paraphrases *Topco* and the reference therein to the Sherman Act as the economic version of our Bill of Rights.¹⁴⁷ This latter "analysis" inevitably leads to findings that American interests are overriding. Whether the courts will meaningfully apply the Revised Restatement's version of the test, however, is far from clear.

The Revised Restatement also proposes that courts give separate attention to the "expectations" of the defendant and the interests and norms of the international community.¹⁴⁸ These criteria are relevant to the goal of developing extra-territoriality rules that create a positive climate for international trade. Whether they can be meaningfully applied by the court, however, is questionable.

The "expectations" factor¹⁴⁹ is grounded on the belief that "it would be unfair and improper to hold a person liable under the local law of one state when he had justifiably molded his conduct to conform to the requirements of another state."¹⁵⁰ A multinational that engaged in conduct outlawed by U.S. antitrust laws will, however, always argue "justifiable" reliance on the law of a "haven." How a court is to evaluate such a claim and still give effect to U.S. antitrust laws is far from clear.

The courts also have little guidance available to them when evaluating the importance of regulation to the international political, legal, or economic system.¹⁵¹ For example, antitrust economics has been a useful tool in the development of domestic antitrust law. There is no comparable well-developed theory of the economics of international competition law to which the courts can appeal for guidance.¹⁵²

The Revised Restatement also requires a court to focus separately on the traditions of the international system.¹⁵³ The problem lies in identifying the sources that

145. *Id.* § 403(2)(a)-(c).

146. *Id.* § 403(2)(c).

147. See *supra* text accompanying note 61.

148. REVISED RESTATEMENT, *supra* note 59, § 403(2)(d)-(e) (Tent. Draft No. 2, 1981).

149. *Id.* § 403(2)(d).

150. CONFLICTS RESTATEMENT, *supra* note 138, § 6 comment (g).

151. REVISED RESTATEMENT, *supra* note 59, § 403(2)(e) (Tent. Draft No. 2, 1981). This factor is also derived from the CONFLICTS RESTATEMENT, *supra* note 138, § 6(a), which provides that courts consider "the needs of . . . the international system." As explained in the Official Comments to this section, "Probably the most important function of choice-of-law rules is to make . . . international systems work well. Choice-of-law rules, among other things, should seek to further harmonious relations between states and to facilitate commercial intercourse between them." *Id.* comment (d).

152. See generally *Colloquium on Competition and World Markets: Law and Economics*, 15 N.Y.U. J. INT'L LAW & POL. 299-394 (1983).

153. REVISED RESTATEMENT, *supra* note 59, § 403(2)(f) (Tent. Draft No. 2, 1981).

supply these traditions. International treaties and agreements are one source specifically identified in the *Timberlane* and *Mannington Mills* decisions.¹⁵⁴ Other sources include the Organization for Economic Cooperation and Development (OECD), which serves as a forum for the development of common substantive guidelines, and the United Nations Conference on Trade and Development (UNCTAD), which has been developing guiding Principles on Restrictive Business Practices.¹⁵⁵ Courts can also review the various national competition laws, seeking common strands. The problem with relying upon any of these sources is that different nations interpret even identical substantive rules differently, their interpretations being dependent to a large extent upon their political and economic philosophies. In addition, there may be international norms not formally codified in any international agreement, nor separately enacted by a majority of nation-states. Finally, and most significantly, the history of litigation in this field dramatically demonstrates that there is no international or even "Western" consensus regarding competition policy.

The Revised Restatement offers no radical modifications of existing procedures that suggest how the interests of both the forum and affected nations should be made known to the court. The only new proposal is that the court may take into account statements made by representatives of the interested governments *outside* of the court.¹⁵⁶ The Revised Restatement proposes that courts look to the Department of Justice for expressions of domestic policy.¹⁵⁷

C. A Critique of Judicial Limiting Doctrines: The Laker Airways Litigation

The recent decision of the District of Columbia Circuit Court of Appeals, *Laker Airways Ltd. v. Sabena Belgian World Airlines*,¹⁵⁸ revealed the inability of judicial limiting doctrines to resolve the extra-territoriality issue. Judge Wilkey demonstrated in a scholarly opinion that no matter how formulated, judicial limiting doctrines can never resolve the issue of extra-territoriality because that issue inherently involves *political* considerations beyond the competence of courts.

The *Laker Airways* litigation "represents a head-on collision between the diametrically opposed antitrust policies of the United States and United Kingdom, and is perhaps the most pronounced example in recent years of the problems raised by the concurrent jurisdiction held by several states over transactions substantially affecting

154. See *supra* text accompanying notes 115, 126.

155. See *infra* text accompanying notes 208-14.

156. REVISED RESTATEMENT, *supra* note 59, § 403 reporter's note 6 (Tent. Draft No. 2, 1981). "In making the necessary determination, a court of the United States, for instance, may take into account expressions of interest by a foreign state, whether made through a diplomatic note, a brief amicus curiae, or a declaration by government officials in parliamentary debates, press conferences or communiques." *Id.*

157. *Id.*

Correspondingly, a court may take into account declarations of U.S. interest in official statements or records of decisions by the Executive Branch. For instance, in a private antitrust suit, a court may give weight to a decision by the U.S. Department of Justice that the interest of the United States in applying its antitrust law to a given transaction or activity was not sufficiently strong to overcome the adverse effects on the foreign relations of the United States.

Id. The REVISED RESTATEMENT reformulates the "principle of reasonableness" for purposes of discovery jurisdiction. *Id.* § 420(1)(c) (Tent. Draft No. 3, 1982). However, the test is fundamentally the same as that set out in § 403.

158. 731 F.2d 909 (D.C. Cir. 1984).

several states' interests."¹⁵⁹ Laker Airways, a British airline,¹⁶⁰ filed a series of private antitrust lawsuits in the United States District Court for the District of Columbia against American, British, and European airlines.¹⁶¹ Laker Airways alleged that the Sherman Act was violated by a predatory pricing scheme organized by the defendants in an attempt to eliminate low-priced Laker as a competitor in North Atlantic scheduled air service.¹⁶² The British defendants responded by obtaining an antisuit injunction from the English courts prohibiting Laker from proceeding against them in the U.S.¹⁶³ Under English law the alleged activities were not illegal.¹⁶⁴

The U.S. district court thereupon issued antisuit injunctions against the remaining defendants, preventing them from obtaining similar relief from the English (or

159. *Id.* at 916.

160. Laker Airways was organized under the laws of the Isle of Jersey. Its principal place of business was in London. Laker Airways was a wholly owned subsidiary of Laker Airways, Int'l, Ltd., an English company. *See generally* H. BANKS, *THE RISE AND FALL OF FREDDIE LAKER* (1982).

161. Laker's first suit named Pan American World Airways (Pan Am), Trans World Airlines, Inc. (TWA), McDonnell Douglas Corp. and McDonnell Finance Corp. (collectively McDonnell Douglas), British Caledonian Airways Ltd., British Airways Board (BA), Lufthansa, and Swiss Air Transport Co. as defendants. *Laker Airways Ltd. v. Pan Am. World Airways*, No. 82-3362 (D.D.C. filed Nov. 24, 1982). Laker later joined KLM Royal Dutch Airlines (KLM) and Sabena Belgian World Airlines (Sabena) in a second suit, *Laker Airways Ltd. v. Sabena Belgian World Airlines*, No. 83-0416 (D.D.C. filed Feb. 15, 1983), and Union de Transports Aeriens and SAS in a third suit, *Laker Airways Ltd. v. Union de Transports Aeriens*, No. 83-2791 (D.D.C. filed Sept. 22, 1983).

162. Laker was forced into liquidation in England in early 1982. Defendants' prices for air services, fixed by the International Air Transport Association (IATA), a trade organization of air carriers, were generally much higher than those charged by Laker. Laker alleged that before it began flying, IATA announced a package of fares to compete with it that were predatory. Laker further alleged that in 1981, when it had been weakened, *inter alia*, by defendants' predatory activities, defendants:

conspired to set even lower predatory prices. In October 1981 Pan American Airlines, Trans World Airlines, and British Airways dropped their fares for their full service flights to equal those charged by Laker for its no-frills service. They also allegedly paid high secret commissions to travel agents to divert potential customers from Laker. These activities further restricted Laker's income, exacerbating its perilous economic condition. At IATA meetings in December 1981 at Geneva, Switzerland, and in January 1982 at Hollywood, Florida, the IATA airlines allegedly laid plans to fix higher fares in the spring and summer of 1982 after Laker had been driven out of business.

Laker Airways v. Sabena Belgian World Airlines, 731 F.2d 909, 917 (D.C. Cir. 1984). Laker also claimed that the airline defendants, in furtherance of this scheme, interfered with Laker's attempt to reschedule its financial obligations. *Id.* at 917. In late 1981 Laker had entered into two agreements to purchase new aircraft, one of which was with McDonnell Douglas, financed in part by McDonnell Douglas' export finance subsidiary. By late 1981 Laker was unable to meet its obligations. A rescue plan was agreed upon which provided that McDonnell Douglas would convert its loan into equity in Laker. McDonnell Douglas withdrew from the plan in early 1982. Laker alleged that defendant airlines used their influence as potential purchasers of aircraft to pressure McDonnell Douglas into withdrawing from the rescue plan. *Laker Airways Ltd. v. Pan Am. World Airways*, 559 F. Supp. 1124, 1127 (D.D.C. 1983). The two-count complaint alleged (1) violation of U.S. antitrust laws and (2) a common law intentional tort. Laker sought \$350 million in compensatory damages.

163. *British Airways Board v. Laker Airways Ltd.*, [1983] 3 W.L.R. 545. The two other European defendants named in the original suit, Swissair and Lufthansa, also applied for relief but their applications were not ruled upon. The English Secretary of State also issued an Order and Directives under the Trading Act of 1980, Protection of Trading Interests (U.S. Antitrust Measures) Order 1983 (June 27, 1983), *see supra* note 13, aimed at frustrating the American antitrust action. Indeed, the issuance of this Order and Directives was the "decisive factor" in the issuance of the antisuit injunction by the English Court of Appeals. The decision of the English Court of Appeals was reversed by the House of Lords in July 1984, in *British Airways Board v. Laker Airways Ltd.*, [1984] 3 W.L.R. 413.

164. England was a "haven" because "it is not unlawful (under English law) for a corporation to monopolize commerce by offering exceptional terms resulting in losses so as to drive competitors out of business, with the expectation that the losses will be recouped later once the competitor has been eliminated." *Laker Airways Ltd. v. Pan Am. World Airways*, 559 F. Supp. 1124, 1137 (D.D.C. 1983). While there was a cause of action in England for conspiracy, "the crux of an unlawful conspiracy is an intent to injure the plaintiff, and . . . an agreement or combination which has as its purpose the protection of the interests of the defendants, whatever they may be, is not unlawful." *Id.*

any other foreign) courts.¹⁶⁵ Two of the European defendants appealed, challenging the validity of the U.S. antisuit injunction.

The affected nations' interests in the *Laker* litigation were substantial. Foreign governments view their national carriers "not only as instruments of transportation, but also as instruments of economic policy, domestic and foreign policy (and) national defense."¹⁶⁶ Thus, many foreign governments, including the relevant European countries and the United Kingdom, have sought to protect their national airlines from the vagaries of competition. This has resulted in the negotiation of restrictive bilateral air transport agreements.¹⁶⁷

The circuit court concluded that the United Kingdom and the U.S. had concurrent jurisdiction. The U.S. jurisdictional base was territorial: "[t]he prescriptive application of United States antitrust law . . . is founded upon the harmful effects occurring within the territory of the United States as a direct result of the alleged wrongdoing."¹⁶⁸ The British jurisdictional base was to some extent territo-

165. *Laker Airways Ltd. v. Pan Am. World Airways*, 559 F. Supp. 1124 (D.D.C. 1983). The antisuit injunctions were not issued against Lufthansa or Swissair, both of which had already filed actions in the English courts. See *supra* note 163.

166. B. GIDWITZ, *THE POLITICS OF INTERNATIONAL AIR TRANSPORT* 32 (1980).

As economic instruments, airlines are expected to contribute to the expansion of a country's industrial base, spur the development of remote regions, earn foreign currency, and, in some countries, help to support an indigenous aircraft industry. As political instruments, airlines are perceived by some as conferring prestige upon their countries of registry and are used as tools of foreign policy implementation. Inauguration of air service . . . may be viewed as a symbol of detente, desire for expansion of bilateral ties. . . . In nearly all countries civil airliners are expected to be utilized for military airlift purposes in time of emergency.

Id.

167. Indeed, the conflict between the United States and the United Kingdom over the economic policy applicable to international air transport dates back to an international conference called in 1944 to deal with this question. There, American demands for free competition were met with equally strident demands by the English, supported by the other European countries, for regulated competition. England succeeded in that dispute, defeating the call for a multilateral aviation agreement based on free competition and negotiating a highly restrictive bilateral agreement with the United States called Bermuda I, United States-United Kingdom Air Transport Services Agreement, Feb. 11, 1946, 60 Stat. 1499-1516, T.I.A.S. No. 1507, and referred to by Europeans as "the Magna Carta of civil aviation." Sion, *Multilateral Air Transport Agreements Reconsidered: The Possibility of a Regional Agreement Among North Atlantic States*, 22 VA. J. INT'L L. 155, 163 n.43 (1981). Bermuda I represented a model for all other European bilateral aviation agreements. To this day, the restrictive model is the basis for inter-European civil aviation. See generally *id.* at 155.

168. *Laker Airways Ltd. v. Sabena Belgian World Airlines*, 731 F.2d 909, 922 (D.C. Cir. 1984). Judge Wilkey conceded that "[a]lthough some of the alleged anticompetitive actions occurred within the United States, most of the conspiratorial acts took place in other countries." *Id.* at 923-24 (footnotes omitted). However, this was of "no overriding significance, since the economic consequences of the alleged actions gravely impair significant American interests." *Id.* at 924. The significant interests of American consumers and American creditors superseded Laker's interests since it was in liquidation. The following interests of American consumers were identified by Judge Wilkey:

For decades, a great percentage of passengers on North Atlantic air routes has been United States citizens. The greatest impact of a predatory pricing conspiracy would be to raise fares for United States passengers. No other single nation has nearly the same interest in consumer protection on the particular combination of routes involved in Laker's antitrust claims.

Id. (footnotes omitted). As to the creditors:

Because Laker is currently being liquidated, the claims of its creditors are even more directly at stake than consumer interests. Laker is now little more than a corporate conduit through which its assets, including any damages owed Laker, will pass to its creditors. Its antitrust action is primarily an effort to satisfy its creditors, who ultimately bear the brunt of the injury allegedly inflicted upon Laker. . . . Laker's principle creditors are Americans. Laker's fleet of American manufactured DC-10 aircraft was largely financed by banks and other lending institutions in the United States. Moreover, a substantial portion of its total debt obligations are likely to have been American, since the bulk of the debts and expenses were payable in American dollars. The actions of the alleged conspirators destroyed the ability of Laker to repay these American creditors; any antitrust recovery will therefore benefit these United States interests.

rial,¹⁶⁹ but was primarily based on the "British *nationality* of the parties involved."¹⁷⁰ Thus, each had prescriptive jurisdiction to issue the antisuit injunctions.

The court then turned to the question relevant to our discussion: whether there was "some satisfactory avenue, open to an American court, which would permit the frictionless vindication of the interests of both Britain and the United States."¹⁷¹ The court held that there was not, because "[t]he conflict faced here is not caused by the courts of the two countries. Rather, its sources are the fundamentally opposed national policies toward prohibition of anticompetitive business activity. These policies originate in the legislative and executive decisions of the respective countries."¹⁷² U.S. policy is procompetitive and aggressively extra-territorial,¹⁷³ while "the government of the United Kingdom is now and has historically been opposed to most aspects of United States antitrust policy insofar as it affects business enterprises based in the United Kingdom."¹⁷⁴

The court found the "rule of reason" useless in allocating jurisdiction when jurisdiction is concurrent:

Many of the contacts to be balanced are already evaluated when assessing the existence of a sufficient basis for exercising prescriptive jurisdiction. Other factors, such as "the extent to which another state may have an interest in regulating the activity," and "the likelihood of conflict with regulation by other states" are essentially neutral in deciding between competing assertions of jurisdiction. Pursuing these inquiries only leads to the obvious conclusion that jurisdiction could be exercised or that there is a conflict, but does not suggest the best avenue of conflict resolution. . . . Those contacts which do purport to provide a basis for distinguishing between competing bases of jurisdiction, and which are thus crucial to the balancing process, generally incorporate purely political factors which the court is neither qualified to evaluate comparatively nor capable of properly balancing.¹⁷⁵

Thus, the proposed consideration of "the degree to which the *desirability* of such regulation [of restrictive practices] is *generally accepted*"¹⁷⁶ is a political one:

Id. (footnotes omitted). The court identified other U.S. interests:

In addition to the protection of American consumers' and creditors' interests, the United States has a substantial interest in regulating the conduct of business within the United States. The landing rights granted to appellants are permits to do business in this country. Foreign airlines fly in the United States on the prerequisite of obeying United States law.

Id. (footnotes omitted). "The United States has an interest in maintaining open forums for resolution of creditors' claims." *Id.* at 925.

169. "A number of the purported conspiratorial acts took place in Great Britain [and t]he conspiracy allegedly caused bankruptcy of a corporation operating in Great Britain." *Id.* at 926.

170. *Id.* (emphasis in original).

171. *Id.* at 945.

172. *Id.*

173. The Court found the "effects" test articulated in *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945), implicitly ratified by congressional inaction over the past 40 years. 731 F.2d 909, 945-46 (D.C. Cir. 1984).

174. 731 F.2d 909, 946 (D.C. Cir. 1984). The court continued:

The British Government objects to the scope of the prescriptive jurisdiction invoked to apply the antitrust laws; the substantive content of those laws, which is much more aggressive than British regulation of restrictive practices; and the procedural vehicles used in the litigation of the antitrust laws, including private treble damage actions, and the widespread use of pretrial discovery.

Id.

175. *Id.* at 948-49.

176. REVISED RESTATEMENT, *supra* note 59, § 403(2)(c) (Tent. Draft No. 2, 1981) (emphasis added).

[A]lthough more and more states are following the United States in regulating restrictive practices, and even exercising jurisdiction based on effects within territory, *the differing English and American assessment of the desirability of antitrust law is at the core of the conflict. An English or American court cannot refuse to enforce a law its political branches have already determined is desirable and necessary.*¹⁷⁷

The existence of *justified* expectations¹⁷⁸ is also a political factor since it depends on the *desirability* of applying U.S. antitrust law to a particular case. Similarly, a third factor, "the importance of regulation to the regulating state," is a political one.¹⁷⁹

We are in no position to adjudicate the relative importance of antitrust regulation or nonregulation to the United States and the United Kingdom. It is the crucial importance of these policies which has created the conflict. A proclamation by judicial fiat that one interest is less "important" than the other will not erase a real conflict.¹⁸⁰

The court further argued that the "rule of reason" was unlikely to achieve its goal of promoting international comity.¹⁸¹ Courts applying that analysis have deferred to foreign jurisdictions only when U.S. interests are *de minimis*: "[w]hen push comes to shove, the domestic forum is rarely unseated."¹⁸² According to the court, one reason for this lies in the nature of national courts:

Despite the real obligation of courts to apply international law and foster comity, domestic courts do not sit as internationally constituted tribunals. Domestic courts are created by national constitutions and statutes to enforce primarily national laws. The courts of most developed countries follow international law only to the extent it is not overridden by national law. Thus, courts inherently find it difficult neutrally to balance competing foreign interests. When there is any doubt, national interests will tend to be favored over foreign interests.¹⁸³

Another explanation is the "inherent noncorrelation between the interest balancing formula and the economic realities of modern commerce."¹⁸⁴ Contrary to the implicit assumption of the rule of reason that "there is a line of reasonableness which separates jurisdiction to prescribe into neatly adjoining compartments of national jurisdiction," there is "the reality of our interlocked international economic network [which] guarantees that overlapping, concurrent jurisdiction will often be present."¹⁸⁵

In spite of the serious practical difficulties that the court admittedly faced in asserting jurisdiction, it declined to effect a political compromise and would not

177. 731 F.2d 909, 949 (D.C. Cir. 1984) (emphasis in original).

178. REVISED RESTATEMENT, *supra* note 59, § 403(2)(d) (Tent. Draft No. 2, 1981).

179. *Id.* § 403(2)(c).

180. 731 F.2d 909, 949 (D.C. Cir. 1984).

181. *Id.* The court noted that "the usefulness and wisdom of interest balancing to assess the most 'reasonable' exercise of prescriptive jurisdiction has not been affirmatively demonstrated. This approach has not gained more than a temporary foothold in domestic law. Courts are increasingly refusing to adopt the approach. Scholarly criticism has intensified." *Id.* (footnotes omitted).

182. *Id.* at 951 (footnotes omitted).

183. *Id.* (footnotes omitted).

184. *Id.*

185. *Id.* at 952 (footnotes omitted).

unilaterally abandon its jurisdiction, holding that to be beyond its authority and, in light of the coercive nature of the English action, not likely to “materially advance the principles of comity and international accommodation.”¹⁸⁶ The U.S. court was in direct conflict with a foreign court. It could not negotiate nor invoke diplomatic channels. Faced with a choice of either asserting or forfeiting jurisdiction, it chose the former.

D. Evaluation of Judicial Limiting Doctrines

The judiciary has developed U.S. policy on the extra-territorial application of the Sherman Act. Not surprisingly, the courts emphasize U.S. competition policy and are implicitly concerned with the development of havens from that policy. The courts are not well-positioned to consider the impact of their decisions on the interests of affected nations and on the efficiency of international trade. Further, whenever issues concerning the interaction of national legal systems have arisen the U.S. courts have often found themselves in an adversarial position. The limiting doctrines, developed and developing, fail to satisfy the objectives set forth in part III of this Article for the following reasons.

1. The Sovereignty-Related Defenses Are Often Dependent upon Form Rather than Substance

Territoriality remains a cornerstone of these defenses. The commercial/noncommercial distinction is also highly dependent upon form. The narrowing of the defenses is probably a response to egregious behavior by some nations and multinational firms. This contraction services the objective of avoidance of havens but does not adequately consider the other three objectives.

2. The Various Formulations of the “Jurisdictional Rule of Reason” Require the Courts to Make Political Judgments that are Beyond Their Competency

In assessing the interests of affected nations, courts must inherently make a political judgment. The importance of particular policies to a foreign government is highly dependent upon political factors. The balancing of the interests of affected nations against those of the U.S. will often involve issues of foreign policy. None of the accepted definitions of the judiciary’s role contemplates that the courts should, or are even competent to, make such judgments.

3. An Affected Nation Does not Have Effective Means by Which to Make Known Its Interests to a U.S. Forum Court

As discussed above,¹⁸⁷ an affected nation acting by proxy through a party or a U.S. government agency cannot effectively present its viewpoint. The interests of the

186. *Id.* at 954.

187. See *supra* text accompanying notes 59–60.

parties to the suit will rarely coincide perfectly with those of the affected nation. The message is diluted when it passes through an intermediary. Further, the court may consider the interests only in reaching its all or nothing decision regarding jurisdiction, so that assertion of jurisdiction completely defeats the interests of the foreign nation.

4. *The Limiting Doctrines Have Been Applied in an Arbitrary Fashion*

Although creative scholars can find threads of doctrinal consistency among the many decisions concerning extra-territorial application of U.S. competition law, the most dominant factor may well be the relative power of the U.S. versus that of the affected parties. Thus, the courts are quick to deny jurisdiction over OPEC, but more sanguine about asserting jurisdiction over international airlines and natural resource companies that are highly dependent upon the American market and which do not have the power to impose dramatic economic sanctions in retaliation.

5. *The Evaluation of an Affected Nation's Interests in Considering Whether to Assert Jurisdiction Limits a Court in its Ability to Consider the Full Range of Objectives*

If the court considers the rule of reason criteria only in determining whether jurisdiction exists, then it must decide on a one-shot basis which objectives predominate. There is an all or nothing dimension to the decision, and the court cannot creatively balance objectives in formulating remedies or in interpreting competition law.

6. *Ultimately, the Limiting Doctrines Fail Because They Represent a Unilateral Attempt to Deal with a Multilateral Problem.*

This point will be elaborated upon in part V of this Article.

V. POLITICAL SOLUTIONS

The political branches have been less successful than the judiciary in developing procedures to minimize conflicts arising from extra-territorial application of the U.S. competition laws, even though legislation would appear to be the preferred solution for such a multifarious and complex problem. No comprehensive legislation dealing with the problem has been enacted, and the only legislative responses have been slightly modified codifications of existing legal doctrines.¹⁸⁸

A number of countries have negotiated bilateral intergovernmental notification and consultation agreements,¹⁸⁹ but these agreements are ineffective because they are nonbinding and are of particularly limited use when *private parties* invoke enforcement proceedings. The ultimate solution probably lies in the adoption of international

188. The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-1611 (1982); the Foreign Trade Antitrust Improvement Act of 1982, 15 U.S.C. § 6(a) (1982).

189. See *infra* text accompanying notes 195-205.

norms of economic regulation, but a pragmatic assessment must necessarily yield little hope of achieving this goal in the foreseeable future. We address each of the political approaches more fully below.

A. Legislation

The extra-territoriality problem appears to be more readily solvable through legislation than through adjudication. By the nature of their role in the legal system, courts can deal only on an ad hoc basis with the particular cases that happen to come before them. Further, the courts must properly interpret and apply relevant legislation and precedent, and therefore cannot step out of their role to create an entirely novel approach designed to achieve the objectives listed in part III. Although congressional hearings were held on the issue,¹⁹⁰ effective legislation has not yet emerged. The current proposals for legislation are directed primarily at limiting extra-territorial private enforcement of the antitrust laws by imposing special restrictions and developing a statutory exemption for foreign cartels.¹⁹¹

1. *Imposing Special Restrictions on Extra-Territorial Litigation*

Elimination of private suits as a solution to the problem of how to weigh the interests of affected nations is superficially attractive, because public enforcers through executive action should always be able to consider the foreign relations aspects of prospective litigation. But any restriction on the right of private enforcement is likely to produce a host of pragmatic problems and call into question fundamental U.S. legal policies. Private enforcement has been an increasingly important component of the enforcement of American antitrust laws.¹⁹² If this were removed in foreign litigation, a very heavy burden would be imposed upon public enforcers. Without greatly increased budgets, a likely result would be greatly reduced enforcement against foreign restraints or a forfeiture of the traditional public enforcer's role complementing private domestic antitrust litigation. Substantial budgetary increases for antitrust enforcement may not currently be politically feasible and will always be a political issue. It is impractical to assume that increases would be immediately forthcoming. Although greatly reduced antitrust enforcement in foreign commerce might be a very satisfactory outcome from the perspective of prospective defendants, it would leave the foreign commerce of the U.S. subject to inefficiencies resulting from unchallenged trade restrictions.

Pragmatic problems are also involved in the imposition of special restrictions on extra-territorial litigation. Many international business transactions do not separate

190. See, e.g., *Hearings on S. 432*, *supra* note 3.

191. Serious proposals include (1) limiting recovery to compensatory damages only, (2) applying a "rule of reason" analysis in foreign commerce cases even though per se rules would be applied domestically, (3) wholly eliminating private suits in foreign commerce, and (4) establishing a system for the exemption of foreign cartels. A related, but more limited, legislative proposal calls for Justice Department (or foreign government) amicus intervention in *private* suits to present the views of the affected nations to the court. See, e.g., ABA Report, *supra* note 57. We believe our proposal is substantially more effective than such proposals.

192. ABA Report, *supra* note 57, at 1-2.

easily into domestic and foreign dimensions. As a consequence, it would be difficult to structure efficient limitations on private enforcement. For example, should a private litigant be restricted if a case were found to have a not insubstantial foreign dimension? Should the foreign and domestic dimensions be segregated so that a private suit and remedies would be limited to domestic impacts? Alternatively, should distinctions focus on the nationality of the parties or the locus of the illegal acts? Each of these approaches has significant shortcomings. Imposing a dichotomy based on locus and nationality could encourage multinationals to conduct anticompetitive activities through intermediaries in foreign havens. On the other hand, subjecting the "domestic" American portion of an international transaction to U.S. antitrust laws would seriously handicap American-based firms in international trade.

Finally, fairness to antitrust victims is a dimension to be considered. Although the private enforcement provisions of the antitrust laws are more concerned with punishing violators than compensating victims, it would be inequitable to allow victims of domestic violations to recover treble damages while victims of identical acts undertaken in a foreign context are denied recovery altogether. If recovery is to be denied, it should be on a case-by-case basis and only because a strong justification exists in the context of the particular litigation to prefer the interests of one or more affected nations. When so much is at stake and the cases are so complex, an arbitrary restriction of recovery rights is bad policy.

2. Legislating a Statutory Exemption for Foreign Cartels

An intriguing current proposal calls for congressional delegation of authority to the executive to grant antitrust exemptions to multiple-nation cartels on grounds of comity or foreign relations.¹⁹³ Under the proposal, government as well as private cartelists (or prospective cartelists) could petition for antitrust immunity, even if no suit has been brought against them.¹⁹⁴ This proposal would further the goal of promoting international trade by allowing firms to plan business activities without fear of the extra-territorial application of U.S. antitrust laws.

Many problems remain to be resolved in the proposals advanced thus far. First, a foreign government engaged in an important national activity (for example, regulating the extraction of a prime natural resource by encouraging private cartels or by fixing prices) is likely to consider a requirement to apply for a discretionary statutory exemption from U.S. law as a highly offensive invasion of its sovereignty. Second, the proposals, which so far have been set forth in only general terms, do not preclude domestic corporations from applying for this exemption, encouraging the search for havens in which pliable foreign governments can sanction otherwise clearly anticompetitive activities. Last, and most important, is the pragmatic problem of how the executive branch can evaluate prospectively the impact of the proposed anticompetitive conduct on U.S. commerce.

193. See, e.g., Rosenthal & Flowe, *A New Approach to U.S. Enforcement of Antitrust Laws Against Foreign Cartels*, 6 N.C.J. INT'L L. & COMM. REG. 81 (1980); Note, *The Applicability of the Antitrust Laws to International Cartels Involving Foreign Governments*, 91 YALE L.J. 765, 788-91 (1982).

194. Note, *supra* note 193, at 789.

B. Bilateral Notification and Consultation Procedures

A number of countries have developed procedures for intergovernmental notification and consultation prior to the assertion of extra-territorial prescriptive jurisdiction in cases involving national competition laws.¹⁹⁵ The U.S. has recently negotiated two such accords, one with Australia¹⁹⁶ and the other with Canada.¹⁹⁷ Under these accords either government, intending to take action involving national economic policy that may affect the interests of the other nation, agrees to notify¹⁹⁸ and if necessary consult with the other prior to taking that action. Each party then is committed to consider the significant national interests of the other in an effort to reduce conflicts.¹⁹⁹ As applicable to the U.S., this primarily affects decisions by the Justice Department and the FTC concerning the initiation of antitrust or unfair trade practice litigation.

The accords are likely to smooth relationships because they formally identify issues most likely to trigger international confrontations. The United States-Australia Accord, negotiated after the *Westinghouse* litigation, identifies the following as areas of special concern to Australia: A U.S. investigation relating to the "exportation from Australia of Australian natural resources or goods manufactured or produced in Australia" that involves conduct (i) required by Australian law; (ii) by an "authority" of the Australian government; (iii) when export to the U.S. is not contemplated; or (iv) which consisted of representations to, or discussions with, the Australian government.²⁰⁰ Therefore, Australia is most concerned about the extra-territorial application of U.S. antitrust laws to its prime natural resources or key domestic industries when there is substantial government involvement and/or minimal and unintended effects on U.S. commerce. The United States-Canada Accord is broader. It refers to *antitrust investigations* by one party (a) of acts conducted "wholly or in part" in the territory of the other; (b) of extra-territorial acts "required, encouraged or approved by the other party;" or (c) more generally, which may reasonably be expected to lead to an enforcement action "likely to affect a national interest of the

195. Such a process has been worked out by the countries of the European Economic Community. Baxter, *supra* note 48, at 842.

196. Agreement Relating to Cooperation of Antitrust Matters, June 29, 1982, United States-Australia, *reprinted in* 43 ANTITRUST & TRADE REG. REP. (BNA) No. 1071, at 36-37 (July 1, 1982) [hereinafter cited as U.S.-Australia Accord].

197. Memorandum of Understanding as to Notification, Consultation and Cooperation with Respect to the Application of National Antitrust Laws, March 9, 1984, United States-Canada, *reprinted in* 46 ANTITRUST & TRADE REG. REP. (BNA) No. 1156, at 560 (Mar. 15, 1984) [hereinafter cited as U.S.-Canada Accord].

198. See, e.g., the U.S.-Canada Accord, *supra* note 197, para. 2(1): "The Parties will notify each other whenever they become aware that their antitrust investigations or proceedings, or actions relating to antitrust investigations or proceedings of the other Party, involve national interests of the other or require the seeking of information located in the territory of the other." The U.S.-Australia Accord, *supra* note 196, is somewhat different. The U.S. agrees to notify the Australian government of any governmental antitrust investigation "that may have implications for Australian laws, policies or national interests," if possible, "prior to the convening of a grand jury or issuance of any civil investigative demand, subpoena or other compulsory process." The government of Australia agrees to notify the U.S. of any policy adopted "that it considers may have antitrust implications for the United States." *Id.* art. 1.

199. Under the U.S.-Australia Accord, *supra* note 196, art. 2, either side can request consultations with the other after notification, and both parties "shall seek earnestly to avoid a possible conflict between their respective laws, policies and national interests and for that purpose to give due regard to each other's sovereignty and to considerations of comity." *Id.*; see U.S.-Canada Accord, *supra* note 197, para. 4.

200. U.S.-Australia Accord, *supra* note 196, art. 2(6)(b).

other party.”²⁰¹ The Accord also refers to *requests for information* in the territory of the other party,²⁰² requiring, *inter alia*, consultations prior to the invocation of defensive antidiscovery legislation.²⁰³

The accords also address how the interests of the affected nation are to be presented in private lawsuits. Both call for amicus intervention by the forum government on behalf of the affected nation, the substance of that intervention to be based upon the intergovernmental consultation.²⁰⁴ This presupposes the completion of consultations prior to the filing of the private suit, or at the very least, prior to the court’s ruling on the jurisdictional issue. This assumption is not necessarily valid in all cases.²⁰⁵

The fatal flaw with the use of bilateral accords, however, is that like the doctrine of comity, these procedures do not result in a determination of which nation’s interests should prevail.²⁰⁶ Moreover, accords are primarily relevant to *governmentally* instituted enforcement proceedings. Thus, they are unlikely to be more effective in avoiding international confrontations than the judicial limiting doctrines. Finally, although they may provide a partial solution to conflicts arising from transactions occurring between two nations, the accords will not effectively address cartels that involve the interests of many nations.

C. International Conventions

The ultimate solution necessarily lies beyond unilateral or bilateral approaches and will require extensive multilateral (for example, most Western nations) or universal international action. Any attempted resolution that falls short of binding “international” legislation or its equivalent, built upon the yielding of national sovereignty, will be self-limited and inherently unstable.

An international convention creating an international restrictive trade practices law appears to be the solution favored by many commentators.²⁰⁷ Through this

201. U.S.-Canada Accord, *supra* note 197, para. 2(2)(i)-(ii), (v).

202. *Id.* para. 2(2)(iii)-2(2)(iv).

203. *Id.* para. 5.

204. See U.S.-Australia Accord, *supra* note 196, art. 6; U.S.-Canada Accord, *supra* note 197, para. 11.

205. For example, in the *Laker* litigation the courts in both England and the U.S. had to render decisions on applications for injunctive relief. The requests for injunctive relief raised issues of jurisdiction and comity and required a ruling prior to the commencement of formal consultations between the two countries as requested by England under Bermuda 2. Requests for injunctive relief, with claims of irreparable harm, simply cannot await formal intergovernmental consultations. While a court could stay the proceedings for a period of time to allow for intergovernmental consultations, it is not required to do so and it may not necessarily be prudent to do so. In this case “there was no time for this process. . . . Either jurisdiction was protected or it was lost. It is unlikely that the employment of a hasty and poorly informed balancing process would have materially aided the district court’s evaluation of the exigencies and equities of Laker’s request for relief.” *Laker Airways Ltd. v. Sabena Belgian World Airlines*, 731 F.2d 909, 950 (D.C. Cir. 1984).

206. Thus, the U.S.-Australia Accord, *supra* note 196, provides that after consultations regarding proposed U.S. antitrust investigations, if “no means for avoiding a conflict between the laws, policies or national interests of the two parties has been developed, each party shall be free to protect its interests as it deems necessary.” *Id.* art. 4(2); see U.S.-Canada Accord, *supra* note 197, para. 7(3).

207. Norton, *Extraterritorial Jurisdiction of U.S. Antitrust and Securities Laws*, 28 INT’L & COMP. L.Q. 575, 596-97 (1979); Taylor, *The Extraterritoriality of the Australian Antitrust Law*, 13 J. INT’L LAW & ECON. 273, 308-09 (1979); Triggs, *Extraterritorial Reach of United States Anti-Trust Legislation: The International Law Implications of the Westinghouse Allegations of a Uranium Producers’ Cartel*, 12 MELB. U.L. REV. 250, 282 (1979).

convention nations could attack the problem directly by establishing a consensus concerning the proper parameters of international competition law. Ratification by most nations would be the equivalent of legislation by a world legislature. At the same time that a substantive law is established, a mechanism for enforcement could be created. Preferably, this would involve a specialized international court with preemptive jurisdiction over any competition lawsuit involving extra-territorial dimensions.

Because such an international agreement would result in the uniform application of a single body of competition law to all multinational transactions, it is not surprising that serious efforts to establish a convention have spanned three decades, running from the Havana Charter for International Trade Organizations through the present U.N.-based action under UNCTAD.²⁰⁸

These efforts have so far resulted only in the 1980 adoption by the United Nations General Assembly of a nonbinding resolution establishing guidelines for the development and implementation of an international antitrust code (U.N. Guidelines).²⁰⁹ The U.N. Guidelines, modeled on the Sherman Act and the Treaty of Rome, appear to establish international norms of economic behavior.²¹⁰ They condemn enterprises (including transnational corporations) that engage in horizontal price-fixing, market or customer allocation, or collective refusals to deal. The Guidelines also condemn unilateral behavior that is predatory, discriminatory, or a means of acquiring control.²¹¹ The facade of compromise and agreement in the Guidelines masked sharp differences between nations on fundamental principles. For example, nations disagreed over the importance of competition vis-a-vis other national interests. Developing states, especially those with economies dependent on a single marketable resource, supported cartelization to control fluctuation in the price and supply of their critical resources, in general opposition to the free trade and market policies of the developed states.²¹² However, to the extent that developing nations were the victims of restrictive business practices they advocated stronger controls on multinational corporations.²¹³ The Guidelines also specifically avoided the issue of extra-territorial jurisdiction of national competition laws.²¹⁴

The establishment of international conventions, perhaps the only way to finally resolve the extra-territoriality issue, is not likely in the foreseeable future.²¹⁵ The

208. See Triggs, *supra* note 207, at 250, 258.

209. The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, G.A. Res. 35/63, 35 U.N. GAOR Supp. (No. 48) at 123, U.N. Doc. A/RFS/35/63 (1980) [hereinafter cited as U.N. Guidelines]. See generally Note, *Antitrust Law: United Nations Guidelines*, 22 HARV. INT'L L.J. 405 (1981).

210. Section B of the Guidelines is modeled on §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1-2 (1982), and art. 85 and 86 of the Treaty Establishing the European Economic Community, *done* March 25, 1957, 298 U.N.T.S. 11. Section B provides that an enterprise engages in restrictive business practices when, by abusing its powerful position in the marketplace (*compare* § 2 of the Sherman Act and art. 86 of the Treaty of Rome) or by making various arrangements with other enterprises (*compare* § 1 of the Sherman Act and art. 85 of the Treaty of Rome), it restrains competition in a way that adversely affects international trade and the economic development of a developing state.

211. U.N. Guidelines, *supra* note 209, § D.

212. Note, *supra* note 209, at 409-10 n.30.

213. *Id.*

214. An issue specifically raised by Canada and the United Kingdom. *Id.* at 410-11.

215. A United Nations Conference is to be held in 1985 to review the entire code. *Id.* at 409.

fundamental problem undermining international efforts lies in the vast differences between the substantive law of the various Western nations. It will be a herculean task to find a satisfactory middle ground; without some middle ground or consensus few nations would ratify any binding convention. Countries with liberal or nonexistent national competition laws would be reluctant to ratify an agreement that greatly expanded the potential liability of their national firms. Countries like the U.S. with more conservative trade practice laws would find themselves required to forfeit components of their long-standing domestic laws. This would represent a radical policy change and would constitute a formidable hurdle to ratification. Roberts and Liebhberg suggest additional reasons why U.S. ratification would be difficult to achieve:

The United States, for example, has for technical reasons arising from its federal constitution only ratified seven conventions and almost certainly would not ratify a convention on multinational companies, which would have to be enforced by the separate states who would not be a party to the convention. Since the overwhelming majority of multinationals are U.S. based this would seriously weaken the convention.²¹⁶

Somehow a formula must be found for successfully integrating the substantive principles of an international convention on restrictive trade practices with domestic antitrust laws. Until this is achieved no ultimate resolution of the issue is possible.

VI. AN INTERIM PROPOSAL

We have argued that satisfactory resolution of the problems surrounding extra-territorial application of national competition laws will not occur until universal rules and norms of economic regulation, promulgated under the auspices of an international body such as the United Nations, are incorporated into the national laws of all member states.²¹⁷ In addition, there must be some international tribunal that is universally accepted as the final arbiter for the interpretation of these norms. An environment in which grating unresolved differences exist concerning the extra-territorial application of national competition laws may ultimately provide incentives for significantly affected nations to work for an effective international convention.²¹⁸ Ironically, deferral to the interests of affected nations by the U.S. or other nations with strong competition laws may remove pressure critical to the ultimate satisfactory

216. Roberts & Liebhberg, *International Regulation of Multinational Enterprises: Trade Union and Management Concerns*, 15 BRIT. J. OF IND. REL. 356, 369 (1977).

217. See *supra* text accompanying note 207.

218. Compare SEC Request for Comments on Waiver By Conduct, 16 SEC. REG. & L. REP. (BNA) 1305, 1314 (1984). In discussing the potential benefits of a proposal that the purchase or sale of securities in the U.S., whether directly or indirectly, should serve as a "waiver by conduct" of any applicable foreign secrecy laws, the SEC noted the following potential "diplomatic" benefit:

Some foreign governments have indicated that they view efforts to compel persons within their territory to produce evidence as an infringement of their sovereignty; however, they recognize that there must be effective means of dealing with the problems created by transnational securities transactions. *Repeated denials* of U.S. requests that evidence be provided on a voluntary basis *would make clear to foreign governments that there is a substantial need for negotiations* to provide an effective means of obtaining the evidence needed to enforce the U.S. securities laws and deter the misuse of secrecy laws, in order to avoid U.S. reliance upon court orders compelling the production of evidence.

Id. at n.43 (emphasis added).

resolution of the problem.²¹⁹ Unilateral compromise of U.S. competition policy in international markets through an expanded "rule of reason" approach will simultaneously expand havens and reduce the chances for the creation of international competition policy.

The U.S. has often been portrayed by affected nations as an "outlaw," creating whatever problem that exists by its rude insistence on extra-territorial application for its competition laws.²²⁰ This characterization is inappropriate if the application of competition laws to international transactions serves broader interests. We have argued that a need exists for the prohibition of hard core anticompetitive activity that may have major impacts upon national economies.²²¹ For example, nations have a right to protect themselves from cartel behavior. We have further argued that creation of havens for anticompetitive activity ill-serves the world economy.²²² The economic impact of monopolistic and cartel behavior is the same whether the actions occur within or across borders; the same deadweight losses may accrue. Until international agreements establish the proper parameters for world competition law, the U.S. should continue to assert the international applicability of its competition laws, subject only to sovereignty-related limiting principles and the dictates of prudence.

The question then becomes how a principle of prudence can effectively be grafted into U.S. law. The problem is exacerbated because the judiciary currently has sole responsibility for implementing any considerations of prudence. As argued above,²²³ the federal courts are ill-equipped for such a task without effective guidance from the political branches.

As an interim and admittedly partial solution, we propose the following: First, that the courts apply a jurisdictional test within their competence—an "intended effects" test limited only by narrowly construed sovereignty-related defenses. Second, that the "rule of reason" analysis be recharacterized into a prudence-based analysis to be invoked only in relatively rare circumstances identified by the political branches. We therefore propose legislation calling for Presidential invocation²²⁴ of

219. Bargaining theory recognizes what is labeled as a *coercive* aspect, involving the use of power of some kind to intimidate, persuade, influence, or force a party to do something it ordinarily would not choose to do. P. DIESING & G.H. SNYDER, *CONFLICT AMONG NATIONS* 22 & n.14, 23 (1977). For a description of underlying conditions and elements significant to international bargaining processes, see *id.* at 195-97, 476-77 & n.5.

220. See, e.g., *Hearings on S. 432, supra* note 3, at 60 ("the British Government has referred to the triple damage action as the 'rogue elephant' of American law").

221. See *supra* note 38.

222. See *supra* text accompanying notes 38-44.

223. See *supra* text accompanying notes 130-31, 175-80.

224. A similar proposal was made, in passing, by Lloyd Cutler. See *Hearings on S. 432, supra* note 3, at 62: I thought it might be possible to have a statute in which, at least in suits against foreign defendants, the Attorney General would be free to come in on behalf of the U.S. Government, after proper co-ordination within the executive branch, to request of the court that the suit be dismissed for foreign policy or conflict of law reasons; and that if the Attorney General so requested, the judge would be *required* to dismiss the private treble-damage action.

Our proposal is more detailed than that of Mr. Cutler and differs from his proposal in at least four respects: (1) as in Hickenlooper, see *infra* note 227, we support assertion of jurisdiction in all but the very exceptional case, as we believe that this approach provides the best incentive for the negotiation of international norms; (2) we reformulated the "rule of reason" in an effort to distill the truly relevant criteria, see *infra* part VI. A.; (3) we do not propose automatic dismissal, for the reasons set forth in the text *infra*; and (4) our proposal focuses on the transaction as well as the defendant.

the "principle of prudence" analysis in a Hickenlooper-type of Amendment to the Clayton Act. Additionally, to promote our second parameter—fostering a positive climate for international trade²²⁵—we endorse calls for legislation creating a new antitrust *exemption* to the Sherman Act to be applied in favor of international cartels by the executive branches of government.²²⁶

A. Proposed Amendment

The Hickenlooper Amendment barred the courts from applying the act of state defense in certain foreign expropriation cases unless, *inter alia*, the President informed the court that consideration of the defense was essential for foreign policy reasons.²²⁷ We propose congressional enactment of similar legislation regarding the "rule of reason" analysis. Specifically, we call for the enactment of the following amendment to section 4 of the Clayton Act:

No United States federal court shall decline on grounds of comity, or a jurisdictional rule of reason, to make a determination on the merits of a private treble damage suit unless the President, in a suit against a foreign defendant and involving a foreign transaction wherein prescriptive jurisdiction has been challenged by such a defendant, determines that jurisdiction against the defendant(s) ought not to be asserted because of the foreign policy interests of the United States.

225. See *supra* text accompanying notes 45–46.

226. See *supra* note 193 and accompanying text.

227. The Second Hickenlooper Amendment to the Foreign Assistance Act of 1964, 22 U.S.C. § 2370(e)(2) (1982), represented Congress' response to the Supreme Court's decision in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), in which the Court held that the courts of the U.S. were prevented by the act of state doctrine from examining the validity of expropriations by the revolutionary Cuban government. The Hickenlooper Amendment provided in relevant part that:

Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party . . . based upon . . . a confiscation . . . by an act of that state in violation of the principles of international law. . . . *Provided*, That this subparagraph shall not be applicable . . . (2) in any case with respect to which the President *determines* that application of the act of state doctrine *is required* in that particular case by the foreign policy interests of the United States and a *suggestion* to this effect is filed on his behalf in that case with the court.

22 U.S.C. § 2370(e)(2) (1982) (emphasis added). The statute only applies to a very narrow category of cases. See *Banco Nacional de Cuba v. First Nat'l City Bank*, 431 F.2d 394 (2d Cir. 1970) (It applies only when a party who suffers an expropriation in violation of international law brings suit to assert his claim to the expropriated property if there is an attempt to market it in the U.S.). On its face the statute appears to provide that if the President determines that the act of state doctrine should be applied in a particular case for foreign policy considerations and so notifies the court, the court may then, and only then, independently consider the application of that doctrine, perhaps in light of the input provided by the President. But this portion of the statute has been construed much more broadly by the REVISED RESTATEMENT, *supra* note 59, § 429. The Official Comments indicate this:

When the amendment applies, absence of a communication from the Executive Branch *requires* the court to conclude that adjudication of the claim would not interfere with the foreign policy interests of the United States.

If the President in a particular case determines that the foreign policy interests of the United States require application of the act of state doctrine, a communication to that effect *is binding* on the court.

Id. at comment (f) (emphasis added). The reporter's notes similarly explain that the Amendment reflects congressional recognition of "the possibility that adjudication of a claim challenging the act of a foreign state might be contrary to the foreign policy interests of the United States; accordingly the Amendment provides that the President may *preclude* adjudication of a particular claim by making a determination to that effect and notifying the court." *Id.* reporter's note 1. Both constructions are supported by the Amendment's legislative history. See *Hearings Before the Comm. on Foreign Affairs, House of Representatives, on Draft Bill to Amend Further the Foreign Assistance Act of 1961, as Amended, and for Other Purposes*, 89th Cong., 1st Sess. 576 (1965) [hereinafter cited as *Hearings on Hickenlooper*].

The President shall invoke this provision by filing with the court, at any time prior to the entry of judgment, a statement that the President has weighed the public interest of the United States government against the private interest of the litigants and determined that jurisdiction ought not to be asserted because of the foreign policy interests of the United States. The President shall identify the relevant defendant(s) and transaction(s). The President's statement shall be accompanied by an analysis of the following factors: (1) the significant economic or national interests of the affected foreign nations including (a) an analysis of the marketing policies of the affected nations, (b) the extent to which the suit arises from (i) the regulation of a prime natural resource or a primary industry of any affected nation and (ii) activities which were required, encouraged or approved by any affected nations, and (c) the extent and manner in which the President believes continuation of the antitrust lawsuit and any potential judgment therefrom may adversely affect the significant economic or other national interests of any affected nation; (2) the countervailing significant economic or other national interests of the United States; (3) the contents of any consultations conducted pursuant to a Notification and Consultation Accord; (4) the possible effects upon United States foreign relations if the court exercises jurisdiction and grants relief; and (5) whether a treaty with any affected nation has addressed the issue.

Receipt of a statement of invocation from the President by a court creates a rebuttable presumption as to the named defendant that the proceeding or the relevant portions thereof should be dismissed.

For purposes of the Amendment: (1) a "foreign defendant" is a person chartered in, or a citizen of, a foreign nation *and* not majority owned by United States citizens, corporations, or other persons;²²⁸ (2) a "foreign transaction" is any commercial transaction or series of related transactions having significant components occurring outside of the United States.

B. Application of the Amendment

Under the proposed legislation courts would apply an "intended effects" test modified *only* by the sovereignty-related defenses. We have noted three outstanding issues with respect to the act of state doctrine: whether or not to (1) retain its rigid territorial limitation; (2) incorporate a "commercial activities" exception; and (3) limit its coverage so that it would not foreclose review of the *motivation* for the foreign act.²²⁹ An affirmative answer to all three issues (1) narrows the availability of the defense, (2) furthers U.S. competition policy, (3) does not violate positive international law, and (4) provides incentives for an international resolution of the problem. We therefore advocate such a construction of the defense.

The proposed amendment modifies the current law on the "rule of reason" analysis in a number of ways. On the one hand, courts can no longer apply the "rule of reason" analysis unless it is invoked by the President. On the other hand, once invoked the rule of reason analysis *must* be considered by the courts, even those in

228. Alternatively, a "foreign defendant" could be defined in a manner similar to the definition of "foreign person" for purposes of the Hart-Scott-Rodino Act. See 16 C.F.R. § 801.1(e)(2)(i) (1984):

(2)(i) Foreign person. The term "foreign person" means a person the ultimate parent entity of which—

(A) Is not incorporated in the United States, is not organized under the laws of the United States and does not have its principal offices within the United States; or

(B) If a natural person, neither is a citizen of the United States nor resides in the United States.

We prefer our version because it is narrower.

229. See *supra* text accompanying notes 83–97.

circuits that have previously declined to adopt it.²³⁰ Courts have rejected the "rule of reason" primarily because it entails an unstructured political analysis beyond their competency.²³¹ Our proposal specifically addresses this issue, and requires the President to provide the courts with political background data and an initial weighing of that data.

The President may not resort to the amendment's procedures for the benefit of a particular defendant unless the defendant (a) affirmatively objects to (b) the assertion of extra-territorial prescriptive jurisdiction. The amendment limits its applicability to *extra-territorial* assertions of jurisdiction with the dual requirements that a lawsuit be against a foreign defendant and involve a foreign transaction. What qualifies as a "foreign transaction" should turn on an analysis of the entire transaction rather than on discrete incidents such as where individual meetings of conspirators took place.²³² The proposed amendment also requires that the defendant affirmatively object by answer, motion, or other appropriate procedural vehicle to the extra-territorial assertion of prescriptive jurisdiction by the court in which the case is proceeding. The requirement that the defendant object to the assertion of jurisdiction is included to insure that Presidential intervention is limited to only those cases in which a good faith basis exists for challenging the subject matter jurisdiction of the forum court.

The President can invoke the proposed amendment's procedures up to the time that judgment is entered by the trial court. This would allow the President the flexibility of delaying the filing until consultations with the affected nations are exhausted (which might affect the substance of the submission) and/or the trial court has ruled on the applicability of any of the sovereignty-related defenses that might render the President's actions moot. Alternatively, the President may decide to file at the outset of the lawsuit in order to avoid a diplomatic confrontation. The *OPEC*²³³ case, which was dismissed on sovereignty-related grounds, is illustrative. In that case the President might have opted to await the court's decision on the sovereignty-related defenses, and no executive action ultimately would have been taken. On the other hand, if retaliatory actions were threatened, the President could have invoked the amendment's procedures immediately.

The President is required to state to the court that the competing interests were weighed and a determination made that jurisdiction should not be asserted against a named defendant because of the foreign policy interests of the U.S.²³⁴ The President is also required to provide the court with the *relevant* underlying data²³⁵ upon which

230. *E.g.*, the Seventh Circuit in *In re Uranium Antitrust Litig.*, 617 F.2d 1248 (7th Cir. 1980); the D.C. Circuit in *Laker Airways Ltd. v. Sabena Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984).

231. *See, e.g.*, *supra* text accompanying note 175; *see also* *Timberlane Lumber v. Bank of Am.* on remand to the district court, 574 F. Supp. 1453, 1465 (N.D. Cal. 1983) ("[A]lthough the judiciary is the most ill-equipped branch of the U.S. government to do so, we are charged to make a limited inquiry into the effect of the defendants' and plaintiffs' actions upon U.S. foreign policy.").

232. Thus, a meeting of Japanese automakers in Japan to fix the prices of cars they made in the U.S. to be sold in the U.S. would not qualify as a foreign transaction. On the other hand, a meeting by Japanese automakers allocating the output of cars made in Japan in an attempt to comply with U.S. import quotas would qualify as a "foreign transaction." *See, e.g.*, *DeKieffer, Antitrust and the Japanese Auto Quotas*, 50 ANTITRUST L.J. 779 (1981).

233. *See supra* text accompanying notes 89-90.

234. Thus complying with the requirements of *Yakus v. United States*, 321 U.S. 414 (1944).

235. As identified by the parties to the Notification and Consultation Accords, discussed *supra* text accompanying notes 200-03.

the decision was made. Action by the President will establish a rebuttable presumption that jurisdiction is not to be asserted over the named defendant(s). For several reasons, presidential power to invoke a rebuttable presumption is preferable to a grant of authority to require an outright dismissal. First, it allows the court to distinguish between those cases in which the executive branch is concerned with foreign policy considerations and those in which the executive branch simply objects to the underlying theory of the case. Second, it allows the court to consider (or reconsider) the sovereignty-related defenses and if appropriate, to dismiss on those grounds rather than on the basis of presidential fiat. Third, it allows the plaintiffs to supplement in court the underlying data provided by the President with material obtained, for example, during discovery, and to demonstrate profound effects on U.S. commerce not brought to the President's attention. The President's submission is likely to issue at the request of the affected nation(s) and/or the defendant(s), and the President, in making the decision, may be less likely to receive direct input from the plaintiffs. Last, the President could necessarily make only an all or nothing choice concerning whether the case should continue against a certain defendant. The courts have greater flexibility and could, for example, determine that they could effectively address the interests of the affected nations when determining remedies.

One last caveat remains. When the President invokes the amendment's procedures, the rebuttable presumption applies only to the named defendant(s) and then only to the specified transaction(s). By the very language of the amendment, the court is barred from applying the rule of reason analysis to any defendant or any transaction not named by the President.

The proposal is drafted to maximize the objectives set forth in part III. The first goal, avoidance of havens,²³⁶ is furthered primarily by the threshold reliance on judicial principles that give the antitrust laws their fullest legitimate jurisdictional reach. It signals the fundamental premise that, absent compelling circumstances, those who engage in activity with substantial and foreseeable anticompetitive effects on U.S. commerce will be subject to the U.S. antitrust laws. The proposal would contribute to our second parameter—a positive climate for international trade—in at least one important dimension. It should greatly increase planning efficiency in that firms could generally anticipate the extra-territorial application of U.S. laws. Invocation of the reasonableness criterion by the executive branch and the judicial reaction thereto would establish a line of precedent that would guide the planning of affected multinationals. Achievement of the second parameter is obviously more fully realized by adoption of proposals for prospective antitrust exemptions. Although such proposals are beyond the scope of this Article, we endorse them in principle.²³⁷

The proposal is obviously tailored to meet the third parameter. In private actions the affected nations' interests are meaningfully evaluated and balanced with U.S. policies,²³⁸ and especially with the implications for U.S. foreign relations. The initial

236. See *supra* text accompanying notes 38–44.

237. See *supra* note 226 and accompanying text.

238. See *supra* text accompanying notes 47–61.

evaluation is conducted by the branch of government charged with the obligation of formulating and directing our foreign policy and possessed of the requisite expertise—the executive branch. Affected nations can express their interests directly to the executive branch via diplomatic channels and/or pursuant to Negotiation and Consultation Accords. The affected nations will thus be communicating directly to the branch of government considering their claims and can do so regardless of the interests of the particular defendants in the lawsuit. This is clearly preferable to the more indirect amicus intervention or reliance upon the private defendants when the forum for the consideration of the affected nation's interests was the judiciary. The specification of the factors to be evaluated by the executive branch should insure that intervention will occur only in appropriate circumstances. The executive branch must make its case within the parameters established by the statute; it cannot make a decision on unexplained political factors and expect judicial compliance. The procedures established by the proposed statute should result in the development of a formalized procedure by which affected nations are allowed to make their case as forcefully as they can—with the caveat, however, that their case will be disclosed publicly if the Executive Branch decides to invoke its authority under the statute. Finally, the requirement that the President must consider the marketing philosophy of the affected nation when conducting an evaluation is an effort to incorporate the variance in the scope of applied national laws.

One of the barriers to the fourth parameter of promoting the “efficient interaction of national legal systems”²³⁹ is the problem (raised in *Laker*) of “concurrent jurisdiction.”²⁴⁰ The foreign compulsion defense, with its rigid territorial limitation and its requirement that there be *coercive* governmental action, does not adequately respond to the problem.²⁴¹ Under our proposal, the President may inform the court that despite the nonavailability of this defense the interests of the affected nation are so great that their assertion of jurisdiction is more reasonable than U.S. assertions of jurisdiction. It was precisely this type of guidance that Judge Wilkey sought in *Laker*.²⁴²

C. Constitutionality of the Amendment

Precluding the courts from applying a rule of reason or similar analysis unless invoked by the President raises two significant constitutional issues: (1) whether the President would circumscribe the jurisdiction of the U.S. courts in violation of Article III of the U.S. Constitution; and (2) whether the President's action would constitute a taking of property in violation of the fifth amendment to the U.S. Constitution.

239. See *supra* text accompanying notes 62–65.

240. See *supra* text accompanying note 159.

241. See *supra* text accompanying notes 101, 103, and 105–06.

242. *Laker Airways Ltd. v. Sabena Belgian World Airlines*, 731 F.2d 909, 948 (D.C. Cir. 1984). Such guidance was subsequently provided when President Reagan, for “foreign policy reasons,” ordered the Justice Department to abandon its probe of *Laker*. *Wall Street Journal*, Nov. 21, 1984, at 2, col. 3.

We look first at the constitutionality of that portion of the proposal directed at limiting judicial invocation of a comity-based doctrine as the grounds for declining to reach the merits of a lawsuit. This was one aspect of the Hickenlooper Amendment that withstood a due process and separation of powers challenge in *Banco Nacional de Cuba v. Farr*.²⁴³ *Banco Nacional de Cuba* was the continuation of the *Sabbatino* case, the driving force behind the Hickenlooper Amendment. In *Sabbatino*,²⁴⁴ a case involving Cuban expropriation of American property, the Supreme Court mandated application of the act of state defense and remanded. Congress then enacted the Hickenlooper Amendment that barred application of the act of state defense in such cases unless invoked by the President. The President failed to exercise his rights under the Amendment, and the district court on remand issued summary judgment for the U.S. defendant. On appeal, the Second Circuit rejected the Cuban appellant's constitutional challenges. First, the court held that no violation of the due process clause occurred because the act of state defense was not a constitutionally protected property right. The doctrine is based on a judicial policy of abstention unrelated to the merits of the case. A legislative limitation on the availability of that defense is analogous to the modification of statutes of limitation, which "does not create or destroy constitutionally protected property rights in those affected by the changes."²⁴⁵

The Second Circuit also rejected the contention that "the Amendment is a legislative interference with the judicial power and therefore violative of the constitutional doctrine of the separation of powers."²⁴⁶ While the act of state defense had "constitutional underpinnings," it was not constitutionally compelled,²⁴⁷ so that:

[T]he political branches of our national government should be able to modify the Court's decision, choosing another constitutionally permissible alternative [rule of decision], especially as the factor upon which the choice is based, the effect on our foreign relations, is admittedly more within the competence of the political branches of the Government than the competence of the Court.²⁴⁸

The court's reasoning applies with even greater force here when we deal with a comity doctrine that implicates the same foreign relations issues but does not have

243. 383 F.2d 166 (2d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968).

244. 376 U.S. 398 (1964); *see also supra* notes 77, 227.

245. *Banco Nacional de Cuba v. Farr*, 383 F.2d 166, 179 (2d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968).

246. *Id.* at 180.

247. While the Supreme Court held in *Sabbatino* that the act of state doctrine "arises from our governmental system of separation of powers" it did not therefore rule that application of the doctrine was constitutionally compelled or that the case presented a non-justiciable "political question":

To the contrary, the approach was motivated by a recognition that the issues arising from a nation's expropriation of the property of aliens are sensitive ones which the courts in some cases should be able to avoid by application of the act of state doctrine in order not to embarrass the conduct of our foreign relations. Thus a total prohibition upon the courts, declaring that they might never resort to the act of state doctrine, might well be unconstitutional as violative of the separation of powers doctrine. But we need not decide this; such a statutory prohibition upon court action is not before us.

Id. at 181. Similarly, we have not proposed "a total prohibition upon the courts."

248. *Id.* (citations omitted). The court noted that "the Supremacy Clause may require a judicial surrender to the will of Congress in situations which present no constitutional impediment to judicial surrender." *Id.* (footnotes omitted).

“constitutional underpinnings,” so that congressional legislation limiting its use is less likely to tamper with the constitutional allocation of power.

The second and more difficult question is the constitutionality of a congressional grant of power to the executive to create a presumption against the judicial assertion of jurisdiction.

As yet no President has exercised similar rights under the Hickenlooper Amendment²⁴⁹ and the constitutionality of such action has therefore never been tested. Yet precedent suggests that this and similar legislation may withstand due process and separation of power challenges.

In *Dames & Moore v. Regan*²⁵⁰ the Supreme Court upheld the President's authority to *suspend* claims against Iran pending in American courts despite the absence of specific authorization from Congress.²⁵¹ The Supreme Court specifically rejected the separation of power challenge, holding that:

[W]e do not believe that the President has attempted to divest the federal courts of jurisdiction. [The relevant] Executive Order . . . purports only to “suspend” the claims, not divest the federal court of jurisdiction. . . . This case, in short, illustrates the difference between modifying federal-court jurisdiction and directing the courts to apply a different rule of law. The President has exercised the power, acquiesced in by Congress, to settle claims and, as such, *has simply effected a change in the substantive law governing the lawsuit*.²⁵²

The Hickenlooper Amendment also was not a “modification of federal court jurisdiction” but rather merely a change in the substantive law. As stated in testimony at the hearings on the Second Hickenlooper Amendment:

The amendment *does not* in any way change the existing *jurisdiction* of U.S. courts. Under the amendment they will continue to decide only cases and controversies before them. They will continue, as they have in the past, to apply international law as part of the law of the land. The function of the amendment is to see that they can continue to do these things and to give justice to the parties before them except in these special cases where they are requested for foreign policy reasons to *suspend* proceedings.²⁵³

Our proposal is modeled on Hickenlooper, and we believe it similarly does not “in any way, change the jurisdiction of U.S. courts.”

The same issues were raised in *Security Pacific National Bank v. Government and State of Iran*,²⁵⁴ a second case involving the President's suspension of claims against Iran. On the separation of powers issue, the court declined to rule on “the still *unresolved* issue of whether Congress may legislatively withdraw the jurisdiction of the inferior federal courts over a pending case” since here “the President has not

249. REVISED RESTATEMENT, *supra* note 59, § 429 reporter's note 3 (Tent. Draft No. 4, 1983).

250. 453 U.S. 654 (1981).

251. The Court found past Congressional acquiescence to such exercises of presidential power. *Id.* at 678–79.

252. *Id.* at 684–85 (citations omitted, emphasis added).

253. *Hearings on Hickenlooper*, *supra* note 227, at 592 (emphasis added). The Supreme Court declined to rule on the fifth amendment issue, finding it not ripe for adjudication. *Dames & Moore v. Regan*, 452 U.S. 654, 688–89 (1981). Justice Powell, concurring and dissenting in part, implied that there would be a fifth amendment problem to such suspension of claims. *Id.* at 691.

254. 513 F. Supp. 864 (C.D. Cal. 1981).

withdrawn the jurisdiction of the courts'' but rather has simply exercised the power to settle claims against a foreign government.²⁵⁵ On the due process claim plaintiffs relied upon the court's language in *Gray v. United States*²⁵⁶ that although the President had the power to settle claims, "[n]evertheless, the citizen whose property is thus sacrificed for the safety and welfare of his country has his claim against that country; he has a right to compensation, which exists even if no remedy in the courts or elsewhere be given him."²⁵⁷ In *Security Pacific* the court held that this passage was dicta, and in light of subsequent decisions probably was not an accurate reflection of current law.²⁵⁸ No case has been found adjudicating the right to such compensation.²⁵⁹

These two cases obviously are of limited precedential value.²⁶⁰ The conflicts arising from the extra-territorial application of U.S. antitrust laws, while serious, are not as compelling as the Iranian hostage crisis. On the other hand, we do not propose a *suspension* of claims but rather only the creation of a *rebuttable* presumption against the assertion of jurisdiction. We also propose an express delegation of authority by Congress to the President. Accordingly, we do not believe that there are constitutional impediments to our proposal.

VII. CONCLUSION

The extra-territorial application of the U.S. antitrust laws, as articulated in the *Alcoa* "effects test," has been a source of conflict with even our closest trading partners. They object to the extra-territorial application of U.S. economic regulatory laws in general and to the content of the U.S. antitrust laws in particular.

The formulation of proper boundaries for the extra-territorial application of U.S. antitrust laws must be based upon the following four objectives: (1) insuring against gaps in the international order so that firms cannot position themselves in "havens"

255. *Id.* at 881 (emphasis added).

256. 21 Ct. Cl. 340 (1886).

257. *Id.* at 392-93.

258. 513 F. Supp. 864, 882 (C.D. Cal. 1981).

259. 1965 RESTATEMENT, *supra* note 66, § 213 reporter's note (Tent. Draft No. 2, 1981).

260. The utility of *Dames & Moore* as precedent was argued by the majority and dissent in *Laker Airways Ltd. v. Sabena Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984). Judge Starr, dissenting, argued that "principles of comity among the courts of the international community counsel strongly against the injunction in the form issued here" because, *inter alia*, "while the facts of the case are indeed distinguishable, the spirit of the Supreme Court's ruling in *Dames & Moore v. Regan* . . . suggests strongly that a sovereign government can prohibit one of its nationals from proceeding in a particular forum." *Id.* at 957 (Starr, J., dissenting) (citation omitted). Judge Starr noted that "the British Executive appears to be proceeding not from the compelling circumstances of a hostage crisis but from its antipathy toward United States antitrust laws. But it is, in my judgment, not for me to say whether the British Executive's attitude in this respect is reasonable or unreasonable." *Id.* Judge Wilkey, on behalf of the majority, responded to the dissent's reliance on *Dames & Moore*, "which suggests that a national government may prohibit its nationals from suing in *national* or other forums," *id.* at 943 (emphasis added) by raising a number of arguments that are relevant to our analysis. First, Judge Wilkey argued that "in *Dames & Moore* the action taken by our government preserved the United States claims and established a remedy for enforcing them" while the British action cancelled the claims and did not permit recovery of even single damages. *Id.* Second, he argued that "this is not a suit against a government, but a private action against a private corporation on a claim based on monopolistic practices." *Id.* Last, he noted that the American executive took an affirmative position in *Dames & Moore*, whereas in *Laker* "it is the *inaction and silence* of the Executive Branch which is said to shut off the availability of the United States forum"—failure of the Department of Justice to file suit or otherwise intervene—and the court found this inaction ambiguous at best. *Id.* at 944.

and thus avoid the application of reasonable national competition laws; (2) providing an equitable and efficient climate for the transaction of international business; (3) adequately considering and balancing the political and economic interests of both forum and affected nations; and (4) balancing or integrating the differences in procedural and substantive law among the forum and affected nations.

American judicial attempts to articulate proper boundaries for the extra-territorial application of U.S. antitrust laws have failed to satisfy these four objectives. The "sovereignty-related" defenses—the doctrines of foreign sovereign immunity, act of state, and foreign sovereign compulsion—are not geared towards evaluating the interests of the affected nations. Rather, they grant a per se immunity to a foreign sovereign or its coerced agent when acting in the manner specified by these defenses. This approach is at the same time too narrow and too broad. It is too narrow because cases often arise in which the foreign sovereign has significant national interests. Nevertheless, the defendant is not immune if the transaction involves "commercial activity," albeit activity intimately linked with significant sovereign interests, or if the transaction is as a matter of convenience or necessity structured so that it does not fall within the rigid requirements of these defenses. It is overly broad because activity may be encompassed therein that does not implicate significant foreign interests. The jurisdictional "rule of reason" ostensibly requires the courts to be sensitive to the interests of the affected nation, but this analysis is in reality of little utility since it requires courts to make speculative judgments significantly based upon political factors.

The solution to the extra-territoriality issue, in the short and long term, is not a judicial but a political one. The long term solution is the promulgation and enforcement of an international competition law code by an authoritative international body. This solution is not likely to occur in the foreseeable future, and we therefore propose the following interim solution. First, we advocate a narrow interpretation of all the judicial doctrines limiting extra-territorial applications in order to generate friction conducive to multilateral resolution of the problem in the long term. Second, to identify those very few circumstances when extra-territorial jurisdiction must not, even in the short term, be asserted because of current overriding national interests, we propose the legislative creation of a mechanism very similar to that established by Congress in the Hickenlooper Amendments. The President, not the courts, would identify those cases in which overriding *foreign policy considerations* militate against the assertion of jurisdiction, since this is essentially a political, not a judicial, decision. Presidential action would result in a rebuttable presumption against the assertion of extra-territorial jurisdiction.